Petition

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No. ....
IN THE

Supreme Court of the United States

October Term, 1981

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered association,

Petitioner,

vs.

DAVID H. FOX, etc., *et al.*,

Respondents.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, etc., *et al.*,

Petitioners,

vs.

ALAN L. STEIN, etc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

An act of the United States Congress, the Home Owners' Loan Act of 1933, 12 U.S.C. §1464 *et seq.* ("HOLA"), states that a federal agency, the Federal Home Loan Bank Board ("the Bank Board"), "is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of federally chartered savings and loan associations. Pursuant to that statute, the Bank Board has promulgated a regulation, now 12 C.F.R. §545.8-3(f) and (g), expressly confirming (subject to certain restrictions not here relevant) the authority of a federally chartered savings and loan association to include in its mortgage loan contracts and exercise according to its terms a provision, commonly known as a "due-on-sale" clause, permitting the association to declare the unpaid principal balance of a loan immediately due and payable in the event that the borrower transfers or conveys the real property hypothecated as security for the loan ("the federal 'due-on-sale' regulation").

A California statute, California Civil Code §711, as interpreted by the California Supreme Court in *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970, 148 Cal.Rptr. 379 (1978), proscribes the exercise of a "due-on-sale" clause as an unlawful restraint on alienation except when such exercise is required to prevent an impairment in the security for a loan.

In an action initiated by Glendale Federal Savings and Loan Association ("Glendale Federal") in the United States District Court for the Central District of California ("the Central District Court") against certain officials of the State of California and the Bank Board, *Glendale Federal Savings & Loan Association, etc. v. David H. Fox, etc., et al.*, U.S.D.C. (C.D. Cal.) No. 77-3274-WMB ("the *Fox* action"), the Central District Court rendered a declaratory judgment determining, in essence, that federal law has preempted California law with respect to the validity and enforceability of "due-on-sale" clauses contained in the mortgage lending instruments of federal associations and, accordingly, that certain administrative efforts undertaken by officials of the State of California to compel Glendale Federal to comply with California law regarding "due-on-sale" clauses were improper.

In an action initiated by a trade association of federal savings and loan associations and twenty individual federal associations in the United States District Court for the Eastern District of California ("the Eastern District Court") against an official of the State of California and the Bank Board, *Conference of Federal Savings & Loan Associations, etc., et al. v. Alan L. Stein, etc.*, U.S.D.C. (E.D. Cal.) No. S-78-55 PCW ("the *Conference* action"), the Eastern District Court rendered (1) a declaratory judgment determining, in essence, that the application to federal associations of California's "fair lending" laws have been preempted by federal law ("*Conference I*"); and (2) a declaratory judgment determining, in essence, that federal law has preempted California law with respect to the validity and enforceability of "due-on-sale" clauses used by federal associations ("*Conference II*").*

On appeal, the Ninth Circuit reversed the *Fox* judgment and the *Conference II* judgment, determining, in essence, that both the Central District Court and the Eastern District Court "lacked jurisdiction" because "[t]he parties in neither case presented justiciable controversies".

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*The *Conference I* judgment has since been affirmed by the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") and by this Court. See footnote 1, *infra*.

Accordingly, the questions presented by the within appeal are:

1. Did the Ninth Circuit err in concluding that the *Fox* and *Conference* actions failed to present "justiciable controversies"?

2. Assuming that the Ninth Circuit did err in concluding that both the *Fox* and *Conference* actions failed to present "justiciable controversies", did the district courts correctly determine that federal law, including HOLA and the regulations of the Bank Board promulgated thereunder, preempt state laws such as California Civil Code §711 with respect to the "due-on-sale" practices of federally chartered savings and loan associations?

Parties to the Proceedings.

1. The Fox Action.

The petitioner in *Fox*, the plaintiff in the district court and an appellee in the Ninth Circuit, is Glendale Federal.**

The respondents in *Fox*, defendants in the district court and appellants in the Ninth Circuit, and are the Secretary of the Business and Transportation Agency of the State of

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**Pursuant to Rule 28.1 of the Rules of this Court, the Court is hereby advised that the subsidiaries and/or affiliates of Glendale Federal are: (1) Wilshire Glen Services, Inc.; (2) Wilshire Mortgage Corporation; (3) Wilshire Diversified, Inc.; (4) Verdugo Builders, Inc., dba Pacific Glen Insurance Agency; (5) San Juan Hills Country Club; (6) Fir-Fed Services Corporation; (7) Wilshire Realty Investments; (8) Outlook Development Corporation; (9) Hampton Homes and Housing Corporation, dba Florida Communities Oceanside; (10) Sentinel Communities, Inc., dba Florida Communities and the Woodhawk Club; (11) Sentinel Broward, Inc., dba Florida Communities of Broward; (12) Sentinel Highland, Inc., dba Florida Community Highland Beach and Hidden Harbor Club; (13) Hutchinson Island Homes, Inc., dba Florida Communities Hutchinson Island; (14) Horizons Development, Inc., dba Rolling Hills Lake Estates; (15) Oceanside Communities, Inc., dba Sea Ranch Club of Boca and Bonaventure Joint Venture; (16) Boca Coast Communities, Inc., dba Sea Ranch of Boca Intracoastal; (17) Florida Southern Mortgage Corporation; (18) Florida Real Estate Appraisers, Inc.; and (19) Verdugo Service Corporation.

California, Alan L. Stein ("the Secretary"), the Commissioner of the California Department of Real Estate, David H. Fox ("the Commissioner"), and a Deputy Commissioner of the California Department of Real Estate, John H. DeClercq ("the Deputy Commissioner").*** The Secretary is the chief executive officer of the Business and Transportation Agency of the State of California, an agency that consists, *inter alia*, of the California Department of Savings and Loan, the California Department of Real Estate and the California State Banking Department. (Cal. Gov. Code §§13975 and 13976.) The Secretary "has the power of general supervision over, and is directly responsible to the Governor for, the operations of each department, office, and unit within the agency"; and he "may issue such orders as he deems appropriate to exercise any power or jurisdiction, or to assume or discharge any responsibility, or to carry out or effect any of the purposes vested by law in any department in the agency." (Cal. Gov. Code §13978.) The Commissioner is the chief executive officer of the California Department of Real Estate and the Deputy Commissioner is employed by the Commissioner. (Cal. Bus. & Prof. Code §§10071 and 10073.)

The Bank Board is also a party to the *Fox* action, having been a defendant and cross-complainant in the district court and an appellee in the Ninth Circuit.

2. The Conference II Action.

The petitioners in *Conference II*, plaintiffs in the district court and appellees in the Ninth Circuit, are the Conference

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***At the commencement of both the *Fox* and the *Conference* actions the office of the Secretary was held by Richard T. Silberman, and is presently held by Alan L. Stein. Since their individual identities are of no legal significance for purposes of the within proceedings, each is referred to simply as "the Secretary" without distinction between them. See Rule 40.3 of the Rules of this Court. In addition, the Secretary, the Commissioner and the Deputy Commissioner are sometimes referred to collectively as "the state defendants."

of Federal Savings and Loan Associations ("the Conference"), a trade association the membership of which includes approximately sixty federally chartered savings and loan associations that have their principal place of business in California, and various individual federally chartered savings and loan associations that have their respective principal places of business in California, Alameda Federal Savings and Loan Association, Bay View Federal Savings and Loan Association, California Federal Savings and Loan Association, Coast Federal Savings and Loan Association (on its own behalf and as successor to First Federal Savings and Loan Association of San Diego), Eureka Federal Savings and Loan Association, First Federal Savings and Loan Association of Santa Monica, First Federal Savings and Loan Association of South Pasadena, Home Federal Savings and Loan Association of San Diego, Pacific Federal Savings and Loan Association (formerly Santa Fe Federal Savings and Loan Association, on its own behalf and as successor to Pacific Federal Savings and Loan Association), Peoples Federal Savings and Loan Association, Pomona First Federal Savings and Loan Association, Provident Federal Savings and Loan Association of Riverside, Redlands Federal Savings and Loan Association (on its own behalf and successor to Orange Belt Federal Savings and Loan Association), Republic Federal Savings and Loan Association, San Francisco Federal Savings and Loan Association, The Heart Federal Savings and Loan Association, and Western Federal Savings and Loan Association. (The Conference and the aforenamed federal associations are sometimes referred to collectively as "the federal associations".)****

****Pursuant to Rule 28.1 of the Rules of this Court, the Court is hereby advised that the subsidiary of Alameda Federal Savings and Loan Association is Alfed Service Corp.; the subsidiaries of Bay View Federal Savings and Loan Association are Bay View Auxiliary Corp.,

(footnote continued on following page)

The respondent in *Conference II*, defendant in the district court and appellant in the Ninth Circuit, is the Secretary.

Bay View Financial Corp., Automatic Bank Services, Inc., Bay Counties Insurance Agency, Inc., and Bay View Advertising Agency; the subsidiaries of California Federal Savings and Loan Association are Cal Fed Consultants, Cal Fed Enterprises, Cal Fed Insurance Agency, Inc., Jensen & Ritchie Advertising, Inc., M.K. Service Corp., Novus Capital Corp., Plaza Builders, Inc., Plaza Mortgage Co., California Thrift & Loan, Cal Fed Finance Co., and CF Merger Corp.; the subsidiaries of Coast Federal Savings and Loan Association are CFS Service Corp., Coast Mortgage and Realty Investors, Service Development Corp., and Fidelity and Guaranty Co.; the subsidiary of Eureka Federal Savings and Loan Association are Eureka Financial Corp. (dba Sequoia Financial Corp.), which has a wholly owned subsidiary Akerue, Inc., and Foundation Inc. (a non-profit corporation); the subsidiaries of First Federal Savings and Loan Association of Santa Monica are Seaside Financial Corp., and Oceanside Insurance Agency, Inc.; the subsidiary of First Federal Savings and Loan Association of South Pasadena is Home Guard Services, Inc.; the subsidiaries of Home Federal Savings and Loan Association of San Diego are Home Capital Corp. (formerly Home Business Development Corp.), Charles K. Fletcher Insurance Agency, Nationwide Capital Corp., and Home Federal Trust; the subsidiaries of Pacific Federal Savings and Loan Association are La Cresta Service Corp., Pacifica Insurance Service, Inc., The Pacifica Corp., Pacifica Real Property Investment Corp., and Data Line Service Company; the subsidiaries of Peoples Federal Savings and Loan Association are Friendly Insurance Agency, Inc., Queenchester Corp., and Fountainwood Investment Corp.; the subsidiaries of Pomona First Federal Savings and Loan Association are Pomona Financial Services, Inc., Diversified Services, Inc., Pomona Service Company, PSC Insurance Service, and Data Line Service Company; the subsidiary of Provident Federal Savings and Loan Association is Provident Financial Corp.; the subsidiary of Redlands Federal Savings and Loan Association is Redlands Financial Services, Inc.; the subsidiaries of Republic Federal Savings and Loan Association are RFS Development Corp., RFS Mortgage Corp., RFS Insurance Agency, and RFS Service Corp.; the subsidiaries of San Francisco Federal Savings and Loan Association are Pacific Home Insurance Company (dba San Francisco Auxiliary Corp.), Franciscan Financial Corp., First Carmel Development Corp., First Deed Corp., and Napa Valley Investment Company; the subsidiary of the Heart Federal Savings and Loan Association is Heart of California, which has a subsidiary, Capital Valley Corp.; the subsidiaries of Western Federal Savings and Loan Association are Western Savers Corp., La Mesa Title Company, Lorraine Insurance Agency, Inc., and Parkhill Advertising and Public Relations, Inc.

Two associations that were plaintiffs in the district court and appellees in the Ninth Circuit, First Federal Savings and Loan Association of San Diego and Orange Belt Federal Savings and Loan Association, have

The Bank Board is also a party to the *Conference II* action, having been a defendant and cross-complainant in the district court and an appellee in the Ninth Circuit.

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merged into other associations that are petitioners herein and have therefore ceased to exist as separate entities. In addition, two other associations that were plaintiffs in the district court and appellees in the Ninth Circuit, Pacific Federal Savings and Loan Association and Santa Fe Federal Savings and Loan Association, have merged and the survivor of the merger, Santa Fe Federal Savings and Loan Association, is now known as Pacific Federal Savings and Loan Association.

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GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered association,

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vs.

ALAN L. STEIN, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The memorandum decision of the Ninth Circuit in the *Fox* and *Conference II* appeals, from which the within petition is taken, a copy of which is attached hereto at Appendix, pp. 1-4, has not been published in any official report or, to the best of petitioners' knowledge, in any unofficial report.

The decision of the Central District Court in the *Fox* action is published at *Glendale Federal Savings & Loan Association v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978) (order granting partial summary judgment) and 481 F.Supp. 616 (C.D. Cal. 1979) (final judgment). The decision of the Eastern District Court in the *Conference II* action is published at *Conference of Federal Savings & Loan Associations v. Stein*, 495 F.Supp. 12 (E.D. Cal. 1979).[1]

II.

GROUNDS FOR JURISDICTION.

This is a petition for writ of certiorari to review the judgment (or decision) of the Ninth Circuit in the *Fox* and *Conference II* appeals, filed September 23, 1981. This Court has plenary jurisdiction to review such a decision under 28 U.S.C. §1254(1).[2]

III.

GERMANE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS.

The constitutional provisions, statutes and regulations germane to the within proceeding are (1) Article VI, Clause 2 of the United States Constitution ("the Supremacy Clause"); (2) Article I, Section 8, Clause 3 of the United States Constitution ("the Commerce Clause"); (3) Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a); (4) 12 C.F.R. §545.8-3(f) and (g); (5) California

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[1] The two district court decisions in the *Fox* action, and the district court decision in the *Conference II* action, are set forth in Appendix, pp. 5-67. The appellate decision in *Conference I* is published at *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

[2] Once this Court grants certiorari, it is empowered to review both jurisdictional issues as well as any and all substantive issues that may be presented by the case, and to enter any judgment that should have been entered by the Court of Appeal. See, *e.g.*, *Boston & Maine Railroad v. Gokey*, 210 U.S. 155, 162 (1908); *Mutual Life Insurance Co. v. Phinney*, 178 U.S. 327, 337 (1900).

Civil Code §711; (6) California Civil Code §2924.6; (7) 28 U.S.C. §1331; and (8) 28 U.S.C. §1337.[3]

IV.

CONSOLIDATED STATEMENT OF THE CASES.

A. General Background.

A primary function of "due-on-sale" clauses is to enable mortgage lenders who extend credit to borrowers for terms of as long as thirty years while paying their own depositors what are essentially prevailing market rates to adjust the interest yield on their loan portfolios to compensate for increases in the cost of lendable funds. In many, and perhaps most, American jurisdictions the use of the "due-on-sale" clause for that purpose is sanctioned as lawful and consonant with sound public policy.

Prior to 1974 California sanctioned the use of the "due-on-sale" clause for the purpose of enabling long-term mortgage lenders to keep the yield on their loan portfolios in line with the cost of lendable funds. In 1974, however, the California Supreme Court, in *Tucker v. Lassen Savings & Loan Association,* 12 Cal.3d 629, 526 P.2d 1169 (1974), reinterpreted California law, departed from the view of other American jurisdictions, and concluded that the exercise of a "due-on-sale" clause for the purpose of adjusting interest rates upon the sale under an "installment sale contract" of the real property hypothecated as security for a loan constitutes an "unreasonable restraint on alienation" in violation of California Civil Code §711.

In 1975, in the wake of the *Tucker* decision, an action was brought in the Central District Court, *Schott v. Mission Federal Savings & Loan Association*, U.S.D.C. (C.D. Cal.) No. CV 75-366-WMB, seeking, *inter alia,* a declaration that since there was no impairment in security, the defendant, a federally chartered savings and loan association, was precluded under California law from exercising the "due-on-sale" clause in a mortage loan contract upon an outright sale of the real property hypothecated as security for a loan.[4]

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[3] **The aforedescribed constitutional provisions, statutes and regulations are set forth, in full, at Appendix, pp. 69-94.**

The Central District Court, prior to ruling upon the merits of the controversy, invited the Bank Board to submit its views concerning the application of California state law to the mortgage lending practices of federal associations; and, in response to that invitation, the Bank Board, on June 30, 1975, rendered, pursuant to its Resolution No. 75-647, an advisory opinion ("the *Schott* Advisory Opinion") that exhaustively analyzed the pertinent legal and policy considerations.

In the *Schott* Advisory Opinion the Bank Board concluded that the existence and exercise of the "due-on-sale" clause for the purpose of adjusting interest rates to compensate for increases in the cost of lendable funds was vital to the operation of the federal saving and loan system and was authorized by a federal regulation mandating that the mortgage loan contracts of federal associations "provide for full protection to the Federal association", 12 C.F.R. §545.6-11 (now §545.8-3).

Over the years the State of California has made sporadic but persistent efforts to arrogate to itself authority over the operation of federal associations; and that effort was revived following the rendition of the *Schott* Advisory Opinion.[5]

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[4] In *Tucker* the California Supreme Court confined itself to the question of whether exercise of the "due-on-sale" clause was lawful in the case of a sale of the real property hypothecated as security for the loan under an "installment sale contract" in which legal title is retained by the seller. It explicitly reserved the question of whether the same rule would apply in the case of an outright sale in which legal title as well as beneficial ownership is transferred, suggesting some possible distinctions between the "land sale contract" and "outright sale" situations and even predicating the *Tucker* decision upon such distinctions. (See 12 Cal.3d 634-39.) Ultimately, however, in *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 970 (1978) the California Supreme Court repudiated the distinctions that it had drawn four years earlier in *Tucker* between the "land sale contract" and "outright sale" situations and extended the prohibition articulated in *Tucker* to outright sales.

On January 14, 1976, both the People of the State of California and the Secretary instituted an action in the Los Angeles County Superior Court, *People of the State of California, etc. v. Glendale Federal Savings and Loan Association,* L.A.S.C. No. C 147921 ("the *People* action"). The gravamen of the *People* action was that the exercise by Glendale Federal of the "due-on-sale" clause in mortgage loan contracts between it and its borrower-members upon the sale under an "installment land sale contract" of the property hypothecated as security for the loan, when undertaken for the purpose of increasing interest rates, violated California law prohibiting restraints on alienation as interpreted by the California Supreme Court in *Tucker v. Lassen Savings & Loan Association, supra.*

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[5] In the late 1940's the People of the State of California and the then Superintendent of Banks of the State of California sought unsuccessfully an "injunction and recovery of statutory penalties" against a federally chartered savings and loan association, Coast Federal Savings and Loan Association, one of the petitioners herein, on the ground that it was "representing itself to be a banking institution, and transacted its business in the manner of a savings bank, in violation of California state statutes and without authority". *People v. Coast Fed. Sav. & Loan Ass'n.*, 98 F.Supp. 311 (S.D. Cal. 1951).

In a little over a decade later, in May of 1963, the then Commissioner of the California Department of Savings and Loan, acting pursuant to Cal. Fin. Code §5253, subpoenaed an officer of a federal association, one Melvin Anaya, to testify before him concerning an application for permission to establish a new branch which the federal association had filed with the Board and, specifically, with respect to the "good faith" of the federal association in submitting the application. When Anaya refused to honor the subpoena, the Commissioner filed in the Los Angeles County Superior Court a petition for an order to compel him to testify, *Preston N. Silbaugh, Savings and Loan Commissioner of the State of California v. Melvin Anaya,* L.A.S.C. No. 818433. Anaya demurred generally to the petition on the ground, *inter alia,* that the California law under which the Commissioner was proceeding did not apply to federally chartered savings and loan associations; the Board interceded in the proceeding as an *amicus curiae* in support of Anaya and against the Commissioner; and ultimately Anaya's demurrer to the petition was sustained.

In addition, and although the Secretary was not formally a party to the *Schott* action, in January of 1976 he caused to be filed in the *Schott* action an *amicus curiae* brief in which he controverted the position of the Bank Board and asserted that California state law was applicable to the "due-on-sale" practices of federal savings and loan associations.

The Bank Board thereupon instituted new rule-making proceedings. On February 6, 1976, it adopted Resolution No. 76-100, proposing an amendment to the Code of Federal Regulations;[6] and on April 28, 1976, it adopted a second resolution, No. 76-296, formally amending the Code of Federal Regulations with respect to the "due-on-sale" practices of federal associations. The preamble to the amendment provided both that "[a] Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the associations' security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent" and that ". . . it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law . . . [and that] Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements . . . ." See also 12 C.F.R. §556.9(j) (46 Fed. Reg. 39,123 (1981)).

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[6] The February 6 resolution observed that "recently the authority of Federal associations to exercise their contractual due-on-sale clauses has been the subject of controversy and litigation in certain states" and that the purpose of the proposed amendment was to "clarify the existing authority of Federal associations to include due-on-sale clauses." The Secretary responded to the promulgation of the proposed regulation and request for comments by letter dated March 19, 1976, stating, *inter alia*, that "any effort to exempt Federal associations from complying with state law [with respect to due-on-sale clauses] is not within the authority of the Federal Home Loan Bank Board".

B. The Fox Action in the District Court.

In late June or early July of 1977 Glendale Federal entered into an agreement "to provide take out loans to prospective purchasers" of units in a real estate development project located in California. The loans were to have been made on Glendale Federal's standard form mortgage loan contracts containing "due-on-sale" clauses.

Under California law units in the project could not lawfully be sold without a "public report" issued by the California Real Estate Commissioner (Cal. Bus. & Prof. Code §§11000 *et seq.*). The regulations of the Commissioner (10 Cal. Adm. Code §2792.6) required a developer to furnish to him, as a condition precedent to securing a "public report", "sample copies of the lender's notes, deeds of trust, mortgages or other security instruments to be executed in connection with such take-out loans"; and, accordingly, the developer furnished to the Department of Real Estate sample forms of Glendale Federal's standardized notes and deeds of trust.

The Department of Real Estate determined that the note and deed of trust forms of Glendale Federal were illegal because they did not conform to a California statute limiting the exercisability of a "due-on-sale" clause, Cal. Civ. Code §2924.6, and, on that ground, declined to issue the requisite public report.[7] The developer thereupon notified Glendale Federal that, given the position of the Department of Real Estate, it could not use Glendale Federal as the "take out" lender on the project (as well as on another planned project).

Confronted with the loss of a business opportunity and the threat of future lost business opportunities, on August 30, 1977, Glendale Federal commenced the *Fox* action in the Central District Court against the Secretary, the Commissioner, the Deputy Commissioner, and the Bank Board.

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[7] Cal. Civ. Code §2924.6 was enacted in 1975 and is applicable to loans made after January 1, 1976.

The gravamen of the action was that the validity and exercisability of the "due-on-sale" clauses in its mortgage loan contracts are governed exclusively by federal law and regulations, including 12 C.F.R. §545.6-11 (now §545.8-3); that Cal. Civ. Code §2924.6 was therefore inapplicable; and, accordingly, that the refusal of the Department of Real Estate to issue public reports based upon the failure of Glendale Federal's mortgage loan contracts to comply with Cal. Civ. Code §2924.6 was unlawful. The complaint prayed for both injunctive and declaratory relief.

Since the action arose under the laws of the United States and an Act of Congress regulating commerce, HOLA, the Central District Court had federal jurisdiction under both 28 U.S.C. §1331 and 28 U.S.C. §1337.

On September 2, 1977, Glendale Federal moved pursuant to Fed. R. Civ. P. Rule 65 for a preliminary injunction restraining the defendant California state officials "from, during the pendency of this action, refusing to issue a public report . . . or refusing to act on an application for issuance of such a public report, on the ground that the notes and deeds of trust of Glendale Federal . . . do not conform to Section 2924.6 of the California Civil Code or to any other laws of the State of California" applicable to "due-on-sale" clauses.

The state defendants opposed the injunction motion, arguing, essentially, that (1) "the official policy of the Commissioner is to issue public reports on proposed subdivision[s] regardless of whether the lending instruments to be used in connection with the sale of the subdivision comply with Civil Code §2924.6"; (2) that "Glendale Federal is not in danger of suffering irreparable injury"; and (3) that "Glendale Federal stands little chance of prevailing on the merits of this litigation".

In its reply Glendale Federal explained (1) that it "most certainly *has* been the policy of the Department of Real Estate . . . to disapprove the note and/or deed of trust of federal savings and loan association on the ground that they do not comply with Civil Code Section 2924.6" and (2) that "[i]f it is not now the policy of the Department of Real Estate to disapprove" federal associations forms for non-compliance with §2924.6, "*the established policy was disavowed solely as a result of the initiation of this lawsuit*" (emphasis added).

The Bank Board answered Glendale Federal's complaint, admitting all of the material charging allegations, and cross-complained against the Secretary. In its cross-complaint the Bank Board alleged that "[a]n actual and continuing controversy exists between the Board and . . . [the] Secretary . . . over the validity and exercisability of due-on-sale clauses by federally-chartered savings and loan associations in California"; that "the controversy manifested itself in various ways", including, *inter alia,* (i) the institution of the *People* action against Glendale Federal, in which the Secretary "asserted that California law directly governs the exercise of due-on-sale clauses by federal savings and loan associations" and that "Glendale Federal Savings and Loan Association was 'acting contrary to law' in asserting that California law did not govern its use of due-on-sale clauses"; (ii) intervention of the Secretary as an *amicus curiae* in the *Schott* action, in which the Secretary took the position "that even if California law does not directly govern the use of due-on-sale clauses by federal savings and loan associations, California law, nevertheless, 'should be adopted as the federal common law standard' "; and (iii) statements by the Secretary, made at public conferences and in meetings, "that California law exclusively governs the validity and exercisability of due-on-sale clauses by federal savings and loan associations in California". Accordingly, the Bank Board prayed, *inter alia,* for a declaratory judgment that "12 C.F.R. §545.6-11 [now 545.8-3], exclusively governs the validity and exercisability of due-on-sale clauses contained in mortgage instruments used by the federal savings and loan associations in California".

In November of 1978, after extended briefing and argument, the Central District Court granted motions for partial summary judgment brought by Glendale Federal and the Bank Board. In a published opinion, *Glendale Federal Savings & Loan Association v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978), the District Court, determined that "Federal law, including specifically 12 C.F.R. §545.6-11(f) and (g), exclusively governs the validity and exercisability of due-on-sale clauses included in Glendale Federal's loan instruments executed on and after June 8, 1976. California law on the validity and exercisability of due-on-sale clauses is inapplicable to Glendale Federal's loan instruments executed on and after June 8, 1976." (459 F.Supp. 912.)

The basic substantive issue presented by the action below having been resolved, the Bank Board and Glendale Federal moved for summary judgment on the remaining issues in the case, essentially the various "affirmative defenses" interposed by the state defendants. In June of 1979, in a second published opinion, *Glendale Federal Savings & Loan Association v. Fox*, 481 F.Supp. 616 (C.D. Cal. 1979), the Central District Court granted the motions and judgment was entered in favor of Glendale Federal and the Bank Board.[8]

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[8] The opinion of the Central District Court included the following passage:

> "State defendants contend that this action is moot because no threat exists that public reports will be denied in the future on the ground that the sample deeds and notes of Glendale Federal do not conform to Section 2924.6 of the California Civil Code. They claim that it is not now and never has been the policy of the California Department of Real Estate to deny public reports under the Subdivided Lands Act on that ground, and that the denials that led to this action were mistakes by the officials responsible. However, *defendants have not acknowledged that the denials of the public reports were unlawful or that California law does not apply to the due-on-sale clauses contained in Glendale Federal's sample deeds and notes. Further, they have not stated that they would not deny public reports in the future* on the ground that the

C. The Conference Action in the District Court.

Confronted with the ongoing conflict between the Bank Board and the Secretary over the application of California law to the mortgage lending practices of federal associations, the Conference and twenty individual federal associations (not including Glendale Federal) instituted the *Conference* action in February of 1978 against the Secretary and the Bank Board. The gravamen of the action was that federal law preempted various aspects of the mortgage lending practices, including the "fair lending" and "due-on-sale" practices, of federal associations; and the relief sought consisted of appropriate declaratory and injunctive relief.

Since the action arose under the laws of the United States and an Act of Congress regulating commerce, HOLA, the Eastern District Court had federal jurisdiction under both 28 U.S.C. §1331 and 28 U.S.C. §1337.

The Bank Board answered the complaint, admitting essentially all of the material charging allegations, and cross-complained against the Secretary. In its cross-complaint the Bank Board alleged, *inter alia,* that an "actual and continuing controversy exists" between the Bank Board and the Secretary "over the validity and exercisability of due-on-sale clauses of federal savings and loan associations doing business in California" and that "its regulation governing due-on-sale clauses, 12 C.F.R. §545.6-11(f) and (g), constitutes the exclusive law governing the use and exercise of such clauses by federal savings and loan associations throughout the United States, and that [the Secretary] has no authority to interfere in any manner with the use of such provisions by federal savings and loan associations." The relief prayed for included a declaratory judgment that Congress had "delegated to the Board exclusive authority to

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sample deeds and notes do not conform to Section 2924.6, *were they to obtain a ruling in this or another court that California law does apply*. The court does not believe that state defendants have demonstrated that this controversy is moot." (481 F.Supp. 627-628; footnote omitted; emphasis added.)

regulate and supervise the lending practices of federal savings and loan associations throughout the country."[9]

On March 7, 1978, the federal associations filed a notice of motion and motion for partial summary judgment with respect to the "fair lending" aspects of the action. In response, on March 13, 1978, the Secretary moved to dismiss the action on the grounds, *inter alia*, that "the court lacks subject matter jurisdiction", that "the court lacks ancillary jurisdiction over the cross-claim", and that "the complaint and cross-claim each fail" to state a claim upon which relief can be granted.

The Eastern District Court heard the respective motions, took them under submission, and on May 10, 1978, announced its intended decision.[10] Thereafter, it entered an order granting partial summary judgment (*Conference I*) and certifying the partial summary judgment as a final judgment pursuant to Fed. R. Civ. P. Rule 54(b).[11]

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[9] Three weeks after the commencement of the *Conference* action, on February 28, 1978, the Secretary himself commenced an action in the San Mateo County Superior Court against federally chartered savings and loan associations to compel compliance with state "fair lending" law (Cal. Health & Safety Code §§35800-35833), *People of the State of California, et al., v. West Coast Federal Savings and Loan Association, etc., et al.*, S.M.C.S.C. No. 220012. In that action, ultimately dismissed, the Secretary sought to impose upon the defendants a penalty of $2,500.00 for each violation by each association of his order to post and disseminate a "Fair Lending Notice" in the form which he prescribed.

The Bank Board responded by amending its cross-claim against the Secretary to add a count and prayer for temporary interlocutory and permanent injunctive relief restraining "the Secretary and those acting in concert with him" from seeking to compel federal savings and loan associations to conform to the state "fair lending" law.

[10] In its statement of intended decision, the Eastern District Court explained: (1) that it had subject matter jurisdiction over the complaint of the federal associations under 28 U.S.C. §§1331 and 1337; and over the cross-claim of the Board "both by way of an ancillary jurisdiction and by way of independent jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1337, and 28 U.S.C. §1345"; and (2) that the Bank Board's "exercise of its plenary regulatory power [12 U.S.C. §1464(a)] . . . to provide for the organization, incorporation, examination, operation and regulation" of federally chartered savings and loan association "preempts legislation by the State of California which attempts to subject federally chartered savings and loans to state regulation and discipline in the area of anti-redlining practices".

In November of 1978, following entry of the aforedescribed partial summary judgment, the Secretary filed, *inter alia,* a motion "for an order staying that portion of the case dealing with preemption of state laws governing the exercise of 'due-on-sale['] clauses until such time as . . . [*Conference I*] is determined". The motion was made on the ground that "[i]n defense of both the anti-redlining portion of the case and the due on sale aspect, the Secretary raised a number of procedural grounds, to wit: (1) that the court lacks subject matter jurisdiction; (2) the court lacks ancillary jurisdiction over the cross-claim; (3) the complaint and cross-claim failed to state a claim upon which relief could be granted; and (4) that this was an inappropriate action for declaratory relief . . . [and] [*b*]*ecause each of these defenses is now before the Court of Appeal* [*in Conference I*], *the court should stay the remaining portions of this action pending resolution of the procedural issues by the Ninth Circuit.*" (Emphasis added.) On January 17, 1978, the Eastern District Court denied, *inter alia*, the motion to stay "without prejudice" to its renewal. The motion, however, was never renewed.

On March 9, 1979, the plaintiff federal associations moved for summary judgment on the grounds that federal law had preempted state law with respect to the exercise of "due-on-sale" clauses by federal associations; and on March 23, 1979, the Bank Board also moved for summary judgment on similar grounds.

Ultimately, on November 2, 1979, the Eastern District Court granted the motions of the federal associations for summary judgment, determining, *inter alia*, that "[t]he Bank Board's exercise of its plenary regulatory power granted by Congress under the Home Owners Loan Act of 1933 . . . preempts any statute and/or law of the State of California which attempts to subject the plaintiff federal savings and loan associations in California to state law or regulation in the area of due-on-sale clauses or practices"; (2) "that California law does not apply to the validity, use and/or exercise of the due-on-sale clauses of the loan instruments of the plaintiff Federal associations"; and (3) "that the validity, use and/or exercise of such due-on-sale clauses is governed exclusively by Federal law."

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[11] The judgment in *Conference I* was affirmed by the Ninth Circuit and by this Court in *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

D. The Consolidated Proceedings in the Ninth Circuit.

The appeals by the California state officials from the *Fox* and *Conference II* judgments were consolidated in the Ninth Circuit. Between the entry of the judgments of the district courts in *Fox* and *Conference II* and the oral argument in the Ninth Circuit, two intermediate appellate courts in California, at the urging of the Secretary appearing as an *amicus curiae* therein, rendered published opinions repudiating the reasoning of the district courts in *Fox* and *Conference II* and holding that California law regarding "due-on-sale" clauses was applicable to federal associations. See *Panko v. Pan American Federal Savings & Loan Association*, 119 Cal.App.3d 916, 174 Cal.Rptr. 240, *appeal docketed*, No. 81-922 (U.S. 1981); *de la Cuesta v. Fidelity Federal Savings & Loan Association*, 121 Cal.App.3d 328, 175 Cal.Rptr. 467, *appeal docketed*, No. 81-750 (U.S. 1981). See also, *e.g.*, *Hehir v. Glendale Federal Savings & Loan Association*, 4th Civ. No. 23309 (Cal.App. July 2, 1981) (unreported opinion), *appeal docketed*, No. 81-992 (U.S. 1981).

The consolidated appeals were argued before the Ninth Circuit on July 16, 1981. At the conclusion of oral argument the Ninth Circuit, over the protests of the Bank Board and the non-governmental appellees, announced that it might defer submission of the appeal in order to afford the California Supreme Court an opportunity to express its views on the preemption issue.[12] On July 27, 1981, however, the Ninth Circuit did order the cases "submitted". (See Appendix, p. 68.)

On August 21, 1981, the California Court of Appeal for the Second Appellate District entered its opinion in the *People* action, explicitly repudiating the preemption analysis of *Panko, supra,* and *de la Cuesta, supra,* and holding that HOLA and the regulations of the Bank Board promulgated thereunder preempted state law with respect to the "due-on-sale" practices of federal associations. See *People v. Glendale Federal Savings & Loan Association,* 122 Cal.App.3d 860, 176 Cal.Rptr. 353 (1981)[13]

On September 15, 1981, following oral argument and the delayed submission of the cases for decision but prior to the issuance of the Ninth Circuit's decision, the Bank Board filed a motion, supported by the affidavits submitted on behalf of five federal agencies not parties to the litigation, including the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Comptroller of the Currency, the Federal Home Loan Mortgage Corporation, and the United States Treasury Department, asking that the consolidated appeals be decided on an expedited basis.[14]

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[12] A petition for hearing in *Panko, supra,* had been filed in the California Supreme Court on July 13, 1981. The California Supreme Court denied the petition on August 19, 1981.

[13] For the reaction of the California Supreme Court to the appellate ruling in the *People* action, see footnote 26, *infra.*

[14] The affidavits and declarations were executed, respectively, by the Chairman of the Federal Deposit Insurance Corporation, William M. Issac; the Chairman of the National Credit Union Administration, Lawrence Connell; the Senior Deputy Comptroller for Bank Supervision for the Office of the Comptroller of the Currency, Paul M. Homan; the President of the Federal Home Mortgage Corporation, Philip R. Brinkerhoff; and the Acting Secretary of the United States Treasury Department, R. J. McNamar.

On September 23, 1981, the Ninth Circuit issued its decision, in unpublished form, determining, in essence, as follows:

1. With respect to *Glendale Federal Savings and Loan Association v. Fox*, No. 79-3573, that there may have been "an actual justiciable controversy when the Complaint was filed"; but events occurring subsequent to the commencement of the action, and specifically the recission by Deputy Commissioner of Real Estate John H. DeClercq of his refusal to issue a public report as required by California Business and Professions Code §§11000-11030 based upon the failure of Glendale Federal's mortgage loan contracts to comply with California Civil Code §2924.6 and the absence of "evidence [which] reasonably suggests that DeClercq's action will be repeated", rendered the issue of whether public reports could properly be denied based upon the failure of mortgage loan contracts to comply with §2924.6 moot and therefor eliminated the "justiciable controversy"; and

2. With respect to *Conference of Federal Savings and Loan Associations v. Stein*, No. 79-4818, the Secretary of the Business and Transportation Agency of the State of California "apparently lacks the authority to enforce the *Wellenkamp* restrictions", that he "has neither threatened nor commenced any action against the plaintiffs", and, accordingly, that no "justiciable controversy" was presented.[15]

It is from the above-described September 23, 1981, decision of the Ninth Circuit that the within proceeding arises.

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[15] The contention that the Secretary lacks the requisite authority to take action that would give rise to a justiciable controversy with respect to the exercisability of "due-on-sale" clauses in mortgage loan contracts is one that the Ninth Circuit apparently contrived *sua sponte*.

V.
REASONS FOR GRANTING THE WRIT.

Petitioners recognize that the question of whether HOLA and the regulations of the Bank Board promulgated thereunder preempt state laws restricting the exercise of "due-on-sale" clauses in the mortgage loan contracts of federal associations is already pending before this Court in various appeals, including, *inter alia, Panko, supra, de la Cuesta, supra,* and *Hehir, supra.* The pendency of those appeals does not, however, obviate the granting of certiorari in the within proceeding.

As explained in §IV, *supra,* over the course of the past three to four decades the State of California has repeatedly attempted to arrogate to itself authority over the operation of federally chartered savings and loan associations doing business in California. Indeed, conduct by the State of California, the institution of the *People* action and the concomitant State endorsement of the view that the "due-on-sale" practices of federal associations are not subject to State law, was, in all likelihood, a major fomenter of the controversy that constitutes the subject of both the above-described pending appeals and the instant litigation.[16] Yet despite the conspicuous role that the State of California has heretofore played with respect to the issue of whether state law applies to the "due-on-sale" practices of federal associations, a failure to grant certiorari in the within proceeding would result in the issue being decided without the presence (at least as a party) of the State of California or any official thereof—an obvious anomaly that can and should be avoided.[17]

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[16] In *Conference I,* and presumably at the instigation of the State of California, approximately thirty state attorneys general submitted a brief as *amici curiae* in which they unsuccessfully advocated the position that federal law does not preempt State law with respect to the "fair lending" practices of federal associations.

A. The Procedural Determinations of the Ninth Circuit Should Be Reversed.

1. The Questions Presented by the Fox Action Are Manifestly Not Moot.

(a) *The Ninth Circuit's Assertion That "No Evidence Reasonably Suggests That DeClercq's Action Will Be Repeated" Is Confuted by the Record.*

The Ninth Circuit has predicated its determination of mootness in the *Fox* action upon the sole assertion that "[n]o evidence reasonably suggests that DeClercq's action [in refusing to issue public reports required by California Business & Professions Code §§11000-11030 based upon the failure of Glendale Federal's mortgage loan contracts to comply with California Civil Code §2924.6] will be repeated." (Appendix, p. 3.) That assertion is confuted by the record.

While it is true that officials of the State of California represented to the Central District Court below that for the time being they would stop denying public reports based upon the failure of Glendale Federal's mortgage loan contracts to comply with California Civil Code §2924.6, they refused to acknowledge that the denials had been unlawful. Moreover, they did not promise that the practice of making such denials would never be resumed. On the contrary, what they said was that "[i]t is not now the policy . . . of the Department of Real Estate to require . . . that a deed of trust or other security device of a federally-chartered savings and loan association proposed as a source of financing for the purchase of subdivision interests conform to the provisions of California Civil Code §2924.6'' and that ''[i]t is not contemplated that the policy . . . will be changed *unless and until there is a definitive determination by a court of law of competent jurisdiction that deeds of trust and other security devices for loans secured by real estate in California utilized by federally-chartered lending institutions must comply with all of the requirements of Civil Code §2924.6*''.

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[17] Aside from any other considerations, for this Court to resolve the "due-on-sale" preemption issue in the context of a case to which officials of the State of California are themselves parties may, as a pragmatic matter, discourage the State of California from attempting in the future to renew its efforts to impose California law upon the operations of federal associations.

Finally, and dispositively, after making the representation to the District Court upon which the Ninth Circuit predicated its determination of mootness, *one of the defendants in the action, the Secretary, moved, in the People action, for a summary judgment specifying that Glendale Federal was subject to the requirements of California Civil Code §2924.6. The obvious implication of that conduct, given the chronology of events and the position taken by the State officials in the Fox action, was that once the Secretary obtained a judicial decision permitting it, the denial of the public reports would be resumed.*

In light of the foregoing, how could the Ninth Circuit conceivably conclude that there was an absence of evidence reasonably suggesting that DeClercq's conduct would be repeated?[18]

(b) *In Any Event, the Central Issue Projected by and Determined in the Fox Action Is Whether Federal Law Preempts California Law With Respect to the ''Due-On-Sale'' Practices of Federal Associations; and That Issue Is Manifestly Not Moot.*

As set forth in §V.A.1.(a), *supra*, the assertion of the Ninth Circuit that ''[n]o evidence reasonably suggests that DeClercq's action will be repeated'' is erroneous.

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[18] In any event, a determination of mootness cannot properly be predicated upon the *absence* of proof that the conduct complained of will be repeated. Rather, it requires a firmative proof that the conduct will *not* be repeated. See, *e.g.*, *United States v. W. T. Grant*, 345 U.S. 629, 632-633 (1953).

In any event, however, and even assuming, *arguendo*, that the assertion is correct, the question of the right of California state officials to deny a public report based upon Glendale Federal's failure to comply with California Civil Code §2924.6 is *not* the only question presented by and determined in the *Fox* action. The central issue projected by and determined in the action is whether federal law preempts California law with respect to the "due-on-sale" practices of federal associations; and that issue is manifestly *not* moot.[19]

(c) *Even Assuming Arguendo That the Issues Presented by the Fox Action Were Moot as Between the Parties, the Central District Was Still Entitled to Decide Them if It Was in the "Public Interest" to Do So; and Obviously It Was.*

As set forth, *supra*, the issues presented by the *Fox* action are not moot; but even if they were, the Central District Court was still entitled to decide them if it was in the public interest to do so. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *Boise City Irr. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904).

Was it in the "public interest" for the Central District Court to adjudicate the *Fox* action? Obviously it was. The basic issue in the case was whether federal or state law governed the "due on sale" practices of federal associations; and that issue is obviously one in which there is widespread public interest. Indeed, the fact that five financial agencies of the federal government not parties to the litigation saw fit to urge the Ninth Circuit to rule expeditiously (see §IV D., *supra*) would, in and of itself, virtually establish the applicability of the "public interest" exception.[20]

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[19] The Central District Court would have had jurisdiction to determine the question of whether federal law preempts state law with respect to the "due-on-sale" practices of federal associations notwithstanding mootness of the narrower question of whether a public report could be denied based upon non-compliance with California Civil Code §2924.6.

2. The Ninth Circuit Erred in Refusing to Pass Upon the Substantive Issue Presented in the Conference II Action.

As set forth in §IV.D, *supra*, the Ninth Circuit determined, *sua sponte*, that the Secretary of the Business and Transportation Agency of the State of California "apparently lacks the authority to enforce the *Wellenkamp* restrictions"; that he "has neither threatened nor commenced any action against the plaintiffs" relating to their due-on-sale practices; and, therefore, that the *Conference II* action failed to present a "justiciable controversy".

The determination is plainly wrong.

A "justiciable controversy" exists for purposes of Article III of the United States Constitution when there is some actual or threatened injury emanating from the defendant that the action will prevent or redress. As the Eighth Circuit Court of Appeals stated in *Aetna Life Insurance Co. v. Haworth*, 84 F.2d 695, 697-98 (8th Cir. 1936), *rev'd*, 300 U.S. 227 (1937):

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[20] Courts should be particularly reluctant to refrain from resolving controversies arising out of administrative action where such action is capable of repetition without judicial authorization. As this Court stated in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911):

> "The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . , and these considerations ought not to be, as they might be, defeated, by short-term orders, *capable of repetition, yet evading review*, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress." (Emphasis added.)

Accord: *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *National Broadcasting Co., Inc. v. Federal Communications Commission*, 516 F.2d 1101, 1133-1134, n. 88 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).

Here, of course, the refusal of the Department of Real Estate to issue a public report because of the lack of compliance of Glendale Federal's mortgage loan contracts with California law obviously could recur without judicial authorization.

> "To present an 'actual controversy' within the constitutional meaning of that phrase there must be a . . . showing that the defendant is acting or is threatening to act in such a way as to invade, or prejudicially affect, the rights of the plaintiff . . . . Where these conditions are shown to exist, a declaratory judgment may be a salutary remedy."

Accord: *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *In re Grand Jury Proceedings*, 625 F.2d 1106, 1108 (3d Cir. 1980). See also *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937).

Was there some actual or threatened injury emanating from the Secretary that the *Conference II* action would prevent or redress? Clearly there was.

Aside from anything else, the Secretary brought an action in a California state court that was intended to, and had it been successful might well have, compelled federal associations to comply wilth the *Wellenkamp* rule and thereby injured them by depriving them of the right to exercise the "due-on-sale" clauses in their mortgage loan contracts.

In the *People* action, the Secretary (along with the Attorney General of the State of California) filed a complaint on behalf of the People of the State of California in which he alleged that "pursuant to Government Code §13981 and Financial Code §5250 [he] is authorized to enforce all laws which affect or relate to savings and loan associations chartered by the State of California"; that the action was brought "to enforce California law and to protect California chartered financial institutions"; that [i]n all pertinent respects, [the named defendant,] Glendale [Federal,] is representative of federally chartered savings and loan associations in California"; and that "[t]here is an actual and justiciable controversy between plaintiff and Glendale [Federal] . . . as to their respective claims and contentions". The relief ultimately sought in the action included both a declaration that Glendale Federal, as a federally chartered savings and loan association in California, was subject to the *Wellenkamp* rule and an injunction against enforcement of the "due-on-sale" clauses in its mortgage loan contracts in violation of that rule.

Indeed, when Glendale Federal challenged the authority of the Secretary to maintain the *People* action, he responded by asserting that "[u]nder Government Code Section 11180, the Secretary has authority to prosecute such other matters as provided by law"; that "[i]n this case, plaintiff alleges that defendants have engaged in unlawful and unfair business practice"; that "Business and Professions Code Section 17200 provides that unfair competition shall mean and include unlawful, unfair business practice . . ."; that "[c]learly, accelerating loans in violation of Civil Code Section 711 constitutes an unfair and unlawful business practice"; that under Business and Professions Code §17204 "[a]ny person acting for the interest of itself, its members or the general public" can bring an action to prevent such practice; and that "under this provision [Business and Professions Code §17204], the Secretary has the authority on his own to maintain the [*People*] action".

As things turned out, the Secretary was not successful in the *People* action, the California Court of Appeal having ruled that federal law preempts state law with respect to the "due-on-sale" practices of federal associations. *People v. Glendale Federal Savings & Loan Association*, 122 Cal.App.3d 860, 176 Cal.Rptr. 353 (1981).[21] Had he been successful, however, Glendale Federal directly, and the remaining nongovernmental appellees by implication, would have suffered an impairment in their ability to exercise the "due-on-sale" clauses in their mortgage loan contracts. Upon what conceivable basis, therefore, could it be contended that there was no actual or potential injury emanating from the Secretary that the *Conference* action would prevent or redress?[22]

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[21] See footnote 26, *infra*.

B. The Substantive Issue of Preemption Is Important.

1. Effect Upon the Operation of the Federal Savings and Loan System and the Availability of Mortgage Credit.

Resolution of the preemption issue will greatly affect the operation of the federal savings and loan system and the availability of mortgage credit to the people of the nation.

At present there are several thousand federally chartered savings and loan associations, operating in all states of the United States, with aggregate assets of approximately $350 billion dollars. See United States League of Savings Associations, *'81 Savings and Loan Sourcebook*, p. 37 (1981). The determination of the preemption issue will profoundly influence, among other things, (1) the future mortgage lending practices of federal savings and loan associations and, in particular, their ability to enter into long-term mortgage loan contracts at fixed rates of interest; (2) the acceptability in the secondary mortgage market of loans made by federal associations;[23] (3) the ability of hundreds of thousands of borrowers from federal savings and loan associations under existing long-term fixed interest rate mortgage loan contracts to exact an unbargained for "windfall" at the expense of both federal association lenders, future borrowers and those in the construction trades by, in effect, "selling" their loans at the time that they sell the real property hypothecated as security for such loans; and (4) the legality of thousands, and perhaps hundreds of thousands, or variable interest rate mortgage loan contracts entered into by federal associations since 1978 that are authorized by federal regulation but would violate state law.[24]

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[22] The Eastern District Court had jurisdiction over the *Conference II* controversy under, if nothing else, the doctrine of "pendent jurisdiction".

Indeed, inasmuch as the jurisdictional arguments presented by the Secretary in *Conference II* were identical to those presented by him, and rejected by the Ninth Circuit and this Court, in *Conference I*, was it not, at a minimum, incumbent upon the Ninth Circuit to distinguish the jurisdictional analysis of *Conference II* from *Conference I*?

[23] The Federal National Mortgage Association ("FNMA") now requires that all loans to be purchased by it in the secondary mortgage market under the FNMA Resale Finance Program contain either (1) a fully enforceable "due-on-sale" clause, or (2) a "seven-year call option" permitting FNMA to declare the entire outstanding balance of the loan fully due and payable after seven years. See the FNMA letter of December 12, 1980 addressed to "All FNMA Seller/Servicers"; see also *Savings & Loan News*, December 1980, at pp. 6-7.

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[24] While *Panko, supra,* and *de la Cuesta, supra,* purport to address only the question of whether federal law preempts state law pertaining to the "due-on-sale" practices of federal associations, a logical corollary of the decisions is that any regulation promulgated by the Bank Board pursuant to HOLA and dealing with the mortgage lending practices of federal associations that is permissive rather than mandatory must yield to state law. Since many, if not most, of the Bank Board regulations dealing with the mortgage lending practices of federal associations are both (1) permissive rather than mandatory, and (2) contrary to certain laws of California, the situation has serious possible ramifications transcending the "due-on-sale" issue.

For example, under former 12 C.F.R. §545.6-4(a), as amended September 30, 1980, federal associations were (until August 1, 1981) authorized, but not required, to make "renegotiable rate" loans (1) "for a term of up to thirty years"; and (2) without offering the prospective borrower a fixed rate loan in the same amount. See 45 Fed. Reg. 67, 059 (1980). Under California Civil Code §1916.8 and §1916.9, however, "renegotiable rate mortgage loans" (1) may not have a term in excess of five years; and (2) in conjunction with the making of each "renegotiable rate" loan the lender must have offered "to a borrower who occupies or intends to occupy the property which is security for the loan . . . a fixed rate mortgage loan in the same amount . . .". (In addition, federal associations, while required to make certain substantially similar disclosures, are not required to make the disclosures to borrowers with respect to "renegotiable rate" loans prescribed by California Civil Code §1916.8.)

Furthermore, under current 12 C.F.R. §545.6-4(a), federal associations are authorized to make variable interest loans known as "adjustable mortgage loans" in which (1) the rate of interest may fluctuate as often as every thirty days; (2) in which the amount of such fluctuation is "uncapped" and (3) in which the rate of interest may change during the first semiannual period. See 46 Fed. Reg. 24,148 (1981). Yet under California Civil Code §1916.5—which explicitly purports to apply to

(footnote continued on following page)

2. Effect Upon the Ability of the Bank Board to Effectively Regulate the Operation of Federally Chartered Savings and Loan Associations.

Under HOLA the Bank Board has a mandate to regulate the operations of federally chartered savings and loan associations; and in order to discharge that mandate it must have the authority to preempt state laws within the regulated fields. Otherwise the operation of federal associations would be controlled by the vagaries of the laws of fifty different jurisdictions.

The decision of the state courts in *Panko, supra,* and *de la Cuesta, supra,* coupled by the refusal of the Ninth Circuit to rule in the within proceedings, however, vitiates the existence of the requisite preemptive authority. If allowed to continue, it would relegate the Bank Board to the function of chartering institutions that, once they came into existence, would be compelled to abide by state laws, however pernicious, inane or incompatible they may be with the policy objectives of HOLA and the Bank Board; and the Bank Board's mandate would be confined to regulating in those interstitial areas not occupied by or, superimposing addi-

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federal associations—(1) the rate of interest on a variable interest rate loan "shall change not more often than once during any semiannual period, and at least six months shall elapse between any two such changes"; (2) "[t]he change in interest rate shall not exceed one-fourth of 1 percent in any semiannual period, and shall not result in a rate more than 2.5 percentage points greater than the rate for the first loan payment due after the closing of the loan"; and (3) "[t]he rate of interest shall not change during the first semiannual period." (Recently the California Legislature enacted a "parity" statute, California Financial Code §7150.1, which will expire by its own terms on December 31, 1983, for the purpose of temporarily overriding the limitations imposed by California Civil Code §1916.5.)

Since the foregoing Bank Board regulations are (1) permissive rather than mandatory and (2) in conflict with state law (at least as it existed prior to the enactment of Financial Code §7150.1), does the extant situation mean that all of the loans made by federal associations in California pursuant to such regulations—perhaps aggregating hundreds of millions of dollars—are illegal? Moreover, what about the situation in other states that have restrictions upon adjustable mortgage loans inconsistent with the Bank Board regulation?

tional regulations not inconsistent with, state law—an obviously incongruous situation.[25]

3. Effect Upon the Well Being of the Federal Fisc.

Savings accounts in federally chartered associations are, of course, insured by a federal agency, the Federal Savings and Loan Insurance Corporation ("the FSLIC") (12 U.S.C. §1726); and, at present, such insurance extends to accounts having an aggregate value of approximately $284 billion. (Unpublished data, Statistical Division, Office of Policy and Economic Research, Federal Home Loan Bank Board.)

The FSLIC, which also insures most state-chartered associations, has assets with a book value of only $6.7 billion and a present market value that is considerably less (Federal Home Loan Bank Board, *Journal*, Sept. 1981, p. 51.) Beyond that, also, it also has a statutory right to borrow up to $750,000,000 from the United States Treasury (12

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[25] The within proceedings are directly concerned with HOLA and the authority conferred thereby upon a specific federal agency, the Bank Board. Nevertheless, and while there obviously may be critical and dispositive statutory distinctions, resolution of the preemption issue will, by analogy, have serious implications for the ability of the Comptroller of the Currency and the National Credit Union Administration to preempt state laws affecting the operations of national banking associations and federal credit unions. On March 27, 1981, for example, the Comptroller of the Currency promulgated a new regulation, 12 C.F.R. §29.7, authorizing national banking associations to make adjustable-rate mortgages notwithstanding any limitations imposed by state law. (See 46 Fed. Reg. 18,932 (1981).) More recently, on September 23, 1981, the Comptroller proposed a regulation, 12 C.F.R. §30.1 (see 46 Fed. Reg. 46,964 (1981)), preempting state laws limiting the exercise of "due-on-sale" clauses in all mortgage loans contracts of national banking associations. Similarly, the National Credit Union Administration has authorized federal credit unions both (1) to make adjustable rate mortgage loans regardless of any limitation imposed by state law (see 46 Fed. Reg. 38,669 (1981)); and (2) to exercise "due-on-sale" clauses in mortgage loan contracts of federal credit unions regardless of state law. (See 46 Fed. Reg. 38,676 (1981).)

Does the preemption decision of the state courts in *Panko, supra*, and *de la Cuesta, supra*, mean that the Comptroller and the National Credit Union Administration exceeded (or are threatening to exceed) their respective authorities in promulgating or proposing the aforedescribed regulations?

U.S.C. §1725(i)). Moreover, and whatever the statutory borrowing rights of the FSLIC, the federal government, in order to preserve public confidence, will probably be forced to "stand behind" the FSLIC to the full extent of FSLIC insurance obligations should its resources be exhausted.

At the present time the thrift industry in the United States is in severe financial difficulty. During the first six months of 1981 federally insured associations lost approximately $1.5 billion (see Federal Home Loan Bank Board, *News*, press release, Sept. 29, 1981), and projections for the future are extremely bleak.

A factor that seriously exacerbates such financial difficulty is the restriction that various states have imposed, either by statute or case law, upon the ability of mortgage lenders to exercise "due-on-sale" clauses in their mortgage loan contracts. What such restrictions do, simply stated, is to prolong drastically the life of existing lower-yield mortgage loans and thereby deprive lenders, who must pay essentially the prevailing market rate on lendable funds, of the opportunity to bring the yield on their portfolios into proper ratio with the cost of such lendable funds.

Federally chartered savings and loan associations hold low yield mortgage loans with unpaid principal balances aggregating in the billions of dollars secured by real property located in states that restrict exercise of the "due-on-sale" clause. Hence the financial exposure of the federal government attributable to an inability on the part of federal associations to exercise "due-on-sale" clauses in their mortgage loan contracts, although difficult to quantify, is obviously significant. Indeed, in the case of some associations, whether or not they are able to freely exercise the "due-on-sale" clauses in their mortgage loan contracts could well mean the difference between survival and failure; since any single failure of an insured financial institution can require an expenditure by the FSLIC of hundreds of millions of dollars, the effect upon the federal fisc of even a handful of failures attributable to an inability to exercise the "due-on-sale" clause could be immense.

C. There Is a Divergence of Authority With Respect to the Preemption Issue.

There is a divergence of authority in the Nation, and even within the judicial system of the State of California itself, with respect to the preemption issue.

On the one hand, a host of courts, including every federal court that has addressed the question, have concluded that federal law *does* preempt state law with respect to the "due-on-sale" practices of federal associations. See, *e.g.*, *Price v. Florida Federal Savings & Loan Association*, 524 F.Supp. 175 (M.D. Fla., 1981); *First Federal Savings & Loan Association v. Peterson*, 516 F.Supp. 732 (N.D. Fla. 1981); *Dantus v. First Federal Savings & Loan Association*, 502 F.Supp. 658 (D. Colo. 1980); *Bailey v. First Federal Savings & Loan Association*, 467 F.Supp. 1139 (C.D. Ill. 1979); *People v. Glendale Federal Savings & Loan Association*, 122 Cal.App.3d 860, 176 Cal.Rptr. 353 (1981); *Haugen v. Western Federal Savings & Loan Association*, No. 80 CA 0551 (Colo.App., April 30, 1981).[26]

On the other hand, the Minnesota Supreme Court, in expansive *obiter dicta* in *Holiday Acres No. 3 v. Midwest Federal Savings & Loan Association*, ___ Minn. ___, 308 N.W.2d 471 (1981), has stated that federal law *does*

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[26] On October 28, 1981, the California Supreme Court, while denying a petition for hearing in *People v. Glendale Federal Savings & Loan Association, supra,* directed the California Reporter of Decisions, pursuant to Article VI, Section 14 of the California Constitution and Rule 976 of the California Rules of Court, "not to publish . . . the opinion . . . in the Official Reports . . ." Under Rule 977 of the California Rules of Court "[a]n opinion of a Court of Appeal . . . that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding . . ." that is, presumably, subject to the California Rules of Court. Hence the effect of the California Supreme Court's order of decertification is to eliminate the precedential value of the decision in the California court system.

not preempt state law with respect to "due-on-sale" clauses contained in the mortgage loan instruments of federal associations; and two California courts, seizing upon the *dicta* in *Midwest Federal*, have concurred. See *Panko, supra*, and *de la Cuesta, supra*.

Thus, while the weight of authority clearly favors the view that federal law *does* preempt, there is a divergence of authority upon the point—a divergence that only this Court can resolve.

VI.

CONCLUSION.

The petition for writ of certiorari should be granted.

Dated: December 21, 1981.

Respectfully submitted,

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Appendix I

APPENDIX.

Decision of the Ninth Circuit in the Fox and Conference II Appeals.

MEMORANDUM

[Filed September 23, 1981—Clerk, U.S. Court of Appeals.]

In the United States Court of Appeals, for the Ninth Circuit.

Glendale Federal Savings and Loan Association, a federally-chartered association, Plaintiff-Appellee, vs. David H. Fox, etc., et al., Defendants-Appellants. No. 79-3573, DC# 77-3274 WMB.

Appeal from the United States District Court, for the Central District of California District Judge William M. Byrne, Jr., Presiding.

Conference of Federal Savings and Loan Associations, etc., et al., Plaintiff-Appellee, vs. Alan L. Stein, Successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, et al., Defendant-Appellants. No. 79-4818, DC# S-78-55-PCW.

Appeal from the United States District Court for the Eastern District of California District Judge Philip C. Wilkins, Presiding. [Submitted July 16, 1981].

Before: Wright, Choy and Ferguson, Circuit Judges.

Unreasonable restraints on alienation are prohibited in California by Cal. Civil Code § 711. The California Supreme Court interprets that section to prohibit a lender's exercise of a due-on-sale clause upon transfer of the loan-secured property unless the security interest is impaired. *Wellenkamp v. Bank of America,* 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978); *Tucker v. Lassen Savings*

& Loan Association, 12 Cal. 3d 629, 526 P. 2d 1169, 116 Cal. Rptr. 633 (1974). The *Wellenkamp* rule recently was applied to loans by federally chartered associations. *Panko v. Pan American Federal Savings & Loan Association*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981), *appeal denied* (Cal. S. Ct. August 19, 1981).

Glendale Federal Savings and Loan Association brought suit in federal district court to enjoin various state officials from applying Cal. Civil Code § 711 to federally chartered savings and loan associations. It sought declaratory relief to the effect that federal law solely governed Glendale Federal's use of due-on-sale clauses in its mortgage loan instruments. The district court granted summary judgment in favor of Glendale Federal.

The Conference of Federal Savings and Loan Associations, other individual associations, and the cross-claimant Federal Home Loan Bank Board sought similar declaratory relief. They also were granted summary judgment.

Glendale Federal had planned to develop a condominium project in Santa Clara. It filed its note and trust deed, which included a due-on-sale clause, in an application for a public report required by California's Subdivided Lands Act. Cal. Bus. & Prof. Code §§ 11000-11030.

Appellant Deputy Commissioner of Real Estate DeClercq refused to issue the report because the lending documents failed to comply with Cal. Civil Code § 2924.6, which restricts acceleration of a loan upon the transfer of real property security. DeClercq later rescinded his action.

It is now the express policy of appellant Commissioner of Real Estate and of appellant Secretary of the Business and Transportation Agency to issue public reports under the Subdivided Lands Act even when the lending documents contain due-on-sale clauses.

No threatened harm to Glendale Federal can fairly be traced to appellants. Although DeClercq's initial action may have created an actual and justiciable controversy when the complaint was filed, his rescission negated Glendale Federal's reason to complain. No evidence reasonably suggests that DeClercq's action will be repeated.

In a portion of the *Conference* case resolved previously, *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979) (federal law preempts procedural aspects of state Housing Financial Discrimination Act), the Secretary had attempted actively to enforce state antidiscrimination procedures. But the Secretary apparently lacks the authority to enforce the *Wellenkamp* restrictions. Moreover, he has neither threatened nor commenced any action against the plaintiffs.

Recently, in *Southern Pacific Transportation Co. v. Brown*, 651 F.2d 613 (9th Cir. 1980) (amended opinion forthcoming), we held that no justiciable controversy was presented when plaintiffs challenged the validity of an Oregon statute by suing the state Attorney General, who had no power to enforce the statute. *Id.* at 614-15. The same reasoning applies to the *Conference* action now before us.

For these reasons, we conclude the district courts lacked jurisdiction. The parties in neither case presented justiciable controversies. The record lacks proof of any threatened injury or probable act fairly traceable to the appellants that creates the concrete dispute required by Article III. *Id.* at 615; *see Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-305 (1979) (credible threat of prosecution required); *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952); *Ex parte Young*, 209 U.S. 123, 157 (1908) (eleventh amendment). *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *International Society for*

Krishna Consciousness v. Eaves, 601 F.2d 809, 817-18 (5th Cir. 1979).

The judgments of the district courts are reversed and remanded.

REVERSED and REMANDED.

Decision of the Central District Court Granting Partial Summary Judgment in the *Fox* Action.

[459 F. Supp. 903 (1978)]

Glendale Federal Savings and Loan Association, a Federally Chartered Association, Plaintiff, v. David H. Fox, etc., et al., Defendants. Federal Home Loan Bank Board, Cross-Claimant, v. Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Cross-Claim Defendant. No. 77-3274-WMB.

United States District Court, C. D. California. Nov. 1, 1978.

G. Howden Fraser/Terry O. Kelly, McKenna & Fitting, Los Angeles, Cal., for plaintiff.

Harold B. Shore, Washington, D. C., for Federal Home Loan Bank Bd.

W. Gary Kurtz, Deputy Atty. Gen., Los Angeles, Cal., for defendants.

ORDER

WM. MATTHEW BYRNE, Jr., District Judge.

The question presented by this motion for partial summary judgment is whether state regulation of the validity and exercisability of "due-on-sale" clauses contained in loan instruments of federal savings and loan associations executed on or after June 8, 1976, is preempted by federal law. A "due-on-sale" clause provides the lender an option to declare immediately due and payable all of the sums owed to the lender if all or any part of the real property securing the loan is sold or otherwise transferred by the borrower without the lender's prior consent.

I BACKGROUND

Glendale Federal, the plaintiff, is a federally chartered savings and loan association organized and operating under the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1461, *et seq.* (hereinafter "HOLA"). The Federal Home Loan Bank Board (hereinafter "the Bank Board"), defendant and cross-claimant, is an independent agency of the United States in the Executive Branch, 12 U.S.C. § 1437(b), which, under authority delegated by Congress through Section 5(a) of the HOLA, is responsible for the chartering, examining, supervision, and regulation of federal savings and loan associations. 12 U.S.C. § 1464(a).[1]

The Bank Board has promulgated specific regulations regarding provisions which a federal savings and loan association shall and may include in its loan contracts. 12 C.F.R. § 545.6-11. With respect to the use of due-on-sale clauses by federal savings and loan associations the Bank Board, in April, 1976, adopted certain amendments specifically authorizing the use of such clauses and prescribing certain limitations on their exercise. 12 C.F.R. § 545.6-11(f) and (g). These regulations, which became effective June 8, 1976, state in pertinent part:

> "A federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately

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[1] Section 1464(a) of Title 12, United States Code, provides:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section . . . exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower . . . ." 12 C.F.R. § 545.6-11(f)[2]

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[2] 12 C.F.R. § 545.6-11(g) provides:

"(1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following:

(a) Creation of a lien or other encumbrance subordinate to the association's security instrument;

(b) Creation of a purchase money security interest for household appliances;

(c) Transfer by devise, descent, or by operation of law upon the death of a joint tenant;

(d) Grant of any leasehold interest of three years or less not containing an option to purchase.

(2) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no Federal association shall impose a prepayment charge or equivalent fee in connection with the acceleration of the loan pursuant to the exercise of a due-on-sale clause.

(3) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association shall have waived its option to exercise a due-on-sale clause as to a specific transfer if, prior to that transfer the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) reach written agreement that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its security instrument shall be at such rate as the association shall request. Upon such written agreement and resultant waiver, the association shall release such existing borrower from all obligations under the loan instruments, and for purposes of § 541.14(a), the association shall be deemed to have made a new loan to such existing borrower's successor in interest."

Defendants Fox, DeClercq, and Silberman are, respectively, the Real Estate Commissioner of the State of California, a Deputy Real Estate Commissioner of the State of California, and the Secretary of the Business and Transportation Agency of the State of California. California real estate law requires that the Commissioner of Real Estate examine any proposed "subdivision,"[3] and, unless there are grounds for denial, issue to the subdivider a public report authorizing the sale or lease in California of the lots or parcels within the "subdivision."[4] The sale or lease, or offer for sale or lease, of any lots or parcels contained in a "subdivision" without first obtaining such a public report is prohibited.[5] In connection with the examination of proposed subdivisions, the Real Estate Department requires that the developer of such subdivision identify any lender that will be providing take-out loans to prospective purchasers and submit to the Department sample copies of the lender's notes, deeds of trust, mortgages or other security instruments to be executed in connection with such take-out loans.[6]

In late June or early July, 1977, Glendale Federal agreed with the developer of a partially constructed forty unit condominium project located in California (the "Casa del Rey Project") to provide take-out loans to prospective purchasers of the units. Shortly thereafter, the developer of the

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[3] California Business and Professions Code § 11000.

[4] CaliforniaBusiness and Professions Code § 11018 provides, in pertinent part:

> "The Real Estate Commissioner shall make an examination of any subdivision, and shall, unless there are grounds for denial, issue to the subdivider a public report authorizing the sale or lease in this State of the lots or parcels within the subdivision."

[5] California Business and Professions Code § 11018.2.

[6] *See* Regulations of the Real Estate Commissioner, Title 10 California Administrative Code, § 2792.6

Casa del Rey Project notified defendant DeClercq of the Department of Real Estate that Glendale Federal would be providing take-out loans to purchasers of units in the project and provided to DeClercq sample forms of Glendale Federal's standardized notes and deeds of trust.

In early August, 1977, Glendale Federal was contacted by a representative of the Casa del Rey Project and advised that the Department of Real Estate had determined that the standardized note and deed of trust forms of Glendale Federal were "illegal" and that Glendale Federal could not serve as the take-out lender on the project unless its note and deed of trust were revised. Thereafter, Glendale Federal was provided by the developer with a letter authored by DeClercq stating that "the sample form note and deed of trust do not conform to California Civil Code Section 2924.6," which limits the exercisability of the due-on-sale clause.[7] Concurrent with Glendale Federal's receipt of

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[7] California Civil Code § 2924.6 provides:

> "(a) An obligee may not accelerate the maturity date of the principal and accrued interest on any loan secured by a mortgage or deed of trust on residential real property solely by reason of any one or more of the following transfers in the title to the real property:
>
> (1) A transfer resulting from the death of an obligor where the transfer is to the spouse who is also an obligor.
>
> (2) A transfer by an obligor where the spouse becomes a co-owner of the property.
>
> (3) A transfer resulting for a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree which requires the obligor to continue to make the loan payments by which a spouse who is an obligor becomes the sole owner of the property.
>
> (4) A transfer by an obligor or obligors into an inter vivos trust in which the obligor or obligors are beneficiaries.
>
> (5) Such real property or any portion thereof is made subject to a junior encumbrance or lien.
>
> (b) Any waiver of the provisions of this section by an obligor is void and unenforceable and is contrary to public policy.
>
> (c) For the purposes of this section, 'residential real property' means any real property which contains at least one but not more than four housing units.
>
> (d) This act applies only to loans executed or refinanced on or after January 1, 1976."

DeClercq's letter, the association received written notice from the developer that in light of the position taken by the Department of Real Estate it would be unable to use Glendale Federal as the take-out lender on the Casa del Rey Project or on another project planned by the same developer.

Plaintiff Glendale Federal brought this action for declaratory and injunctive relief on August 30, 1977. Glendale Federal alleges that defendants failed to issue a public report in several instances because the sample notes and deeds of trust provided to the developer by Glendale Federal did not conform to California Civil Code § 2924.6. Plaintiff seeks a judgment declaring that federal law exclusively governs the validity and exercisability of the "due-on-sale" clause utilized by Glendale Federal in its loan instruments, and an injunction restraining defendants from refusing to issue a public report under the Subdivided Lands Act, or refusing to act on an application for such a public report, on the ground that the notes or deeds of trust of Glendale Federal do not conform to California Civil Code § 2924.6.

The crux of plaintiff's and cross-claimant's argument is that regulation of due-on-sale clauses in the loan instruments of federal savings and loan associations is preempted by federal law, and that defendants therefore may not refuse to issue a public report under the Subdivided Lands Act on the ground that the notes and deeds of trust of Glendale Federal do not comply with provisions of California law governing due-on-sale clauses. Defendants contend that the laws of the State of California pertaining to exercise of the due-on-sale clause apply to federal as well as state-chartered savings and loan associations located in California[8]

Prior to June 8, 1976, the Bank Board had no regulation which specifically mentioned due-on-sale clauses. The Bank Board did have a regulation in effect from 1948 which specifically required that each "loan contract" of a federal savings and loan association "shall provide for full protection to the Federal association." 12 C.F.R. § 545.6-11 (1975). The Bank Board construed that version of 12 C.F.R. § 545.6-11 as authorizing due-on-sale clauses. See Advisory Opinion of Federal Home Loan Bank Board, Resolution No. 75-647, *In The Matter of Schott v. Mission Federal Savings and Loan Association*. Glendale Federal and the Bank Board contend in this action that this regulation and the scheme of regulation by the Board prior to June 8, 1976, precluded the application of California law to limit the exercisability of due-on-sale clauses in loan instruments of federal associations. This contention is not before the court on this motion, and the court expresses no view as to its merit. This motion seeks only a declaration that the Bank Board's present regulation respecting due-on-sale clauses, 12 C.F.R. § 545.6-11(f) and (g), exclusively governs the validity and exercisability of those clauses contained in loan instruments executed by federal associations on or after June 8, 1976. The court, for the reasons set forth below, concludes that 12 C.F.R. § 545.6-11(f) and (g) have, since June 8, 1976, preempted state regulation of due-on-sale clauses in the loan instruments of federal associations.

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[8] California Civil Code § 2924.6, *supra* note 8, specifically limits the exercisability of due-on-sale clauses. The California Supreme Court recently addressed the question whether enforcement of a due-on-sale clause, contained in a deed of trust securing real property, upon an outright sale of that property, constitutes an unreasonable restraint on alienation in violation of California Civil Code § 711. *Wellenkamp v. Bank of America*, Cal., 148 Cal.Rptr. 379 (1978). The court held that "a due-on clause contained in a promissory note or deed of trust cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." Id. at 385-86.

II THE DOCTRINE OF PREEMPTION

The doctrine of federal preemption stems from the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." U.S. Const. art. VI, cl. 2. Under that clause, "[o]ccupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." *Parker v. Brown,* 317 U.S. 341, 350, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1942). When such preemption occurs, any state law is inapplicable to an issue which arises in that "field." *Meyers v. Beverly Hills Federal Savings and Loan Ass'n,* 499 F.2d 1145, 1146 (9th Cir. 1974).

The Supreme Court has indicated that when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). The relevant inquiry is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the loan instruments of federal savings and loan associations chartered by the Federal Home Loan Bank Board. *See Ray v. Atlantic Rich-*

field Co., supra, 98 S.Ct. at 994. As the Court stated in *Rice, supra,* 67 S.Ct. at 1152:

> "[The Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. * * * Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject. * * * Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. * * *" *Accord, Ray v. Atlantic Richfield Co., supra,* 98 S.Ct. at 994; *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973).

Even if Congress has not entirely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co., supra,* 98 S.Ct. at 994. A conflict exists "where compliance with both federal and state regulation is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Jones v. Rath Packing Co., supra,* 97 S.Ct. at 1310, 1316-17; *Ray v. Atlantic Richfield Co., supra,* 98 S.Ct. at 994-95.

With this framework in mind, the court turns to the legislative history of the Home Owner's Loan Act and the regulatory scheme established by Congress under that Act.

III THE HOLA AND CONGRESSIONAL INTENT

In 1932, Congress enacted the Federal Home Loan Bank Act in an effort to ameliorate the prevailing emergency in home financing. It created a new federal administrative agency, the Federal Home Loan Bank Board, and directed that agency to charter a series of twelve Federal Home Loan Banks that would serve as wholesale banks for member financial institutions and make mortgage loans directly to members of the public. 47 Stat. 725 (1932), *codified at* 12 U.S.C. § 1421 *et seq.*

In spite of this legislation, the nation's home financing system continued to deteriorate. By 1933, it was estimated that 40% of all home loans in the United States were in default.[9] In response to this crisis, Congress enacted the Home Owners' Loan Act of 1933, the purposes of which were:

> "To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States and for other purposes." Preamble to HOLA, 48 Stat. 128 (1933).

It appears that the crisis to which Congress addressed itself in the HOLA was at least in part a result of ill-advised state practices in home financing.[10] One commentator has stated that "the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that [Bank Board] rules would set an example for uniform and sound savings and loan regulations." T. Marvell, *The Federal Home Loan Bank Board*, p. 26 (1969). Congressional concern that pernicious state savings and loan practices be suppressed, and that the Bank Board be given broad discretion to establish uniform and sound practices, is reflected in the language of the statute and its legislative history.

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[9] Federal Home Loan Bank Board, *The Federal Home Loan Bank System*, p. 17 (1971); *see* Thomas B. Marvell, *The Federal Home Loan Bank Board*, pp. 18-19 (1969).

The HOLA had basically three components. First, it repealed § 4(a) of the Bank Act, thereby eliminating direct loans to homeowners by the Federal Home Loan Banks. 48 Stat. 128, c. 64, § 4 (1933). Second, a new corporation, the Home Owners' Loan Corporation, was created and authorized to exchange its bonds for mortgages held by various financial intermediaries including state-chartered building and loan associations. 48 Stat. 128, c. 64, § 4 (1933) (repealed 80 Stat. 648, § 8(a) (1966)). The only mortgages eligible for such exchange were those which called for direct payment in equal monthly installments. Loans which called for balloon payments, rollover of principal at specified intervals, or repayment by sinking funds were ineligible, despite the fact that such loans were in widespread use throughout the United States at the time by state-chartered savings and loan associations. The mortgage exchange program thus had, as one of its effects, the discouragement of state practices concerning the form of mortgage loan contracts and their replacement with contracts conforming to a uniform federal standard.

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[10] These practices included the use of "sinking fund" loans. Under the terms of these loans, "principal payments were first accumulated in a compulsory savings account until the balance, together with any dividends which had been credited to the account, equalled the amount of the loan, at which time the loan was paid off. Among the disadvantages of this plan were that the loan took longer to mature than expected if dividend rates were reduced, share values could be written down in case of reorganization, and entire share accounts could be sacrificed in case of liquidation, including those required by borrowers. The borrower, however, still owed the full amount of the mortgage." Stanford Research Institute, *The Savings and Loan Industry in California*, Section III-37 (1960).

Third, and most significantly to this motion, the HOLA created a system of federal savings and loan associations. In creating that system, Congress could have elected to subject the operation of federal associations to state law. Instead, Congress, in section 5(a) of the HOLA, gave the Bank Board plenary authority over the creation and operation of federal associations:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U.S.C. section 1464(a).

Federal savings and loans associations were not to be operated and regulated by what a particular state conceived to be the "best practices." Rather, the Bank Board was delegated by Congress the authority to select from the prevailing practices in all the states what it deemed the best practices and to prescribe a nationwide system of operations, supervision, and regulation which would apply to all federal associations.[11]

In *Central Savings and Loan Ass'n of Chariton, Iowa v. Federal Home Loan Bank Board,* 293 F.Supp. 617 (S.D.Iowa 1968), *aff'd,* 422 F.2d 504 (8th Cir. 1970), the district court sustained the Bank Board's authority to authorize a federal association's use of mobile facilities, even though such practices were prohibited by state law. 293 F.Supp. at 621-22. The Eighth Circuit affirmed, stating that:

> "Certainly that statutory language [in 12 U.S.C. section 1464(a)] does not bind the Board inexorably to existing and past practices of local mutual thrift and home-financing institutions." 422 F.2d at 506.

In *Lyons Savings and Loan Ass'n v. Federal Home Loan Bank Board,* 377 F.Supp. 11, 17-18 (N.D.Ill.1974), the court gave a similarly broad construction to section 5(a):

> "[T]he HOLA directs the Board to give 'primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.'

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[11] This conclusion is supported by statements made in conjunction with passage of the HOLA. Testifying at hearings on HOLA held by the U. S. House Committee of Banking and Currency, April 20, 1933, the Chairman of the Bank Board, William F. Stevenson, elaborated on the Board's authority to prescribe regulations:

> "A good many people think we ought to put all the state regulations, what they ought to do and all that kind of thing, in here. But that is left to regulation by the board, who will put the most expert building and loan authorities on it to provide those regulations, so that the regulations can be varied. In some states you have to deal with them one way and in other states another way, and we want the latitude allowed to fit the regulations of the board and the associations to the state law and the different needs." Hearings on HOLA, H.R. 4980, before House Comm. on Banking and Currency, 73rd Cong. 1st Sess. 7 (April 20, 1933) (Statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board).

Representative Luce, one of the managers of the bill, noted in his testimony that "we give the [Bank Board] great power to administer the act." 77 Cong.Rec. 2480, 2573-74 (April 27, 1933).

> . . . the courts have construed this language as vesting discretion in the Board to determine first, what the 'best practices' are, and second, to implement them on a *nationally uniform basis*. The fact that any particular state has not adopted for its own institutions what the Board deems to be a 'best practice' cannot limit the Board's authority without undermining this fundamental purpose of the statute." (emphasis in original)

Congress gave the Bank Board wide discretion to select or reject any state practices as it deemed necessary or desirable in arriving at a uniform federal savings and loan system. Nothing in the Act or its legislative history suggests the Bank Board was to be bound by or subject to any particular state practice or regulation.

Beyond the express delegation of authority contained in Section 5(a) of the HOLA, the creation in the HOLA of a comprehensive and pervasive scheme of federal regulation of federal savings and loan associations reinforces the conclusion that Congress intended to give the Bank Board complete authority to regulate the area. With limited exceptions, a federal association's operations are totally subject to the rules and regulations of the Bank Board. *See* 12 U.S.C. section 1464. The Bank Board prescribes the manner in which capital may be raised, earnings may be distributed, and withdrawals may be effectuated by a federal association. 12 U.S.C. Section 1464(b)(1). The powers of a federal savings and loan association to borrow, give security, insure notes, bonds, debentures or obligations are wholly prescribed by the Bank Board, 12 U.S.C. Section 1464(b)(2). The Bank Board also regulates the authority of a federal association to make and purchase loans and otherwise invest in real estate. 12 U.S.C. Section 1464(a). Congress granted the Bank Board authority to examine the books and records of all federal associations; to institute cease-and-desist proceedings for a violation of any law, rule, or regulation, or for engaging in an unsafe or unsound practice; and to bring charges against an officer, or director of a federal association in order to remove the person from office. 12 U.S.C. Sections 1464(a), (d)(2)(A), and (d)(4)(A). The Bank Board is further authorized to appoint a conservator or receiver to manage the affairs of a federal association; to bring an action to terminate an association's insurance of accounts; and to reorganize, consolidate, liquidate, dissolve or merge federal associations. 12 U.S.C. Sections 1464(d)(6)(A), (d)(11) and 1730. It would have been difficult for Congress to give the Bank Board a broader mandate. As the Court of Appeals for the Ninth Circuit has stated:

> "[P]ursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association 'from its cradle to its corporate grave.' *People of State of California v. Coast Federal Savings and Loan Ass'n*, S.D.Cal., 1951, 98 F.Supp. 311, 316." *Meyers v. Beverly Hills Federal Savings and Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974).

The language, history, structure, and purpose of the Home Owners' Loan Act evidence a clear Congressional intent to delegate to the Bank Board complete authority to regulate federal savings and loan associations and to preempt state regulation. Whenever the Bank Board, pursuant to that plenary authority, promulgates a regulation governing an aspect of the operation of federal savings and loan associations, that regulation governs exclusively and preempts any attempt by a state to regulate in that area.

This conclusion is in accordance with the clear preponderance of authority in this and other circuits. *See Myers* *v. Beverly Hills Federal Savings and Loan Ass'n, supra,* 499 F.2d 1145, 1147 (9th Cir. 1974); *Kupiec v. Republic Federal Savings and Loan Ass'n,* 512 F.2d 147, 150 (7th Cir. 1975); *Rettig v. Arlington Heights Federal Savings and Loan Ass'n,* 405 F.Supp. 819, 823 (N.D.Ill. 1975); *City Savings and Loan Ass'n v. Crowley,* 393 F.Supp. 644, 655 (E.D. Wis. 1974); *Lyons Savings and Loan Ass'n v. Federal Home Loan Bank Board, supra,* 377 F.Supp. 11, 17 (N.D.Ill. 1974); *Elwert v. Pacific First Federal Savings and Loan Ass'n,* 138 F.Supp. 395, 399-400 (D.Or.1956); *People of California v. Coast Federal Savings and Loan Ass'n,* 98 F.Supp. 311 (S.D.Cal. 1951).

In *People v. Coast Federal, supra,* the California Attorney General sought an injunction and recovery of statutory penalities against a federal savings and loan association for violation of state banking laws on advertising. 98 F.Supp. at 315. The court found that the HOLA established a uniform national system and that state law could not be applied to the federal association:

> "Not only does the act of Congress [HOLA] which authorized the creation, operation and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association.
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> * * * * *
>
> . . . [A]s to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision." 98 F.Supp. at

> 318-19; *accord Meyers v. Beverly Hills Federal Savings and Loan Ass'n, supra,* 499 F.2d at 1147.

This language of *People v. Coast Federal* has been echoed in decisions regarding federal preemption of state regulation of federal savings and loan associations.[12]

The Ninth Circuit has taken the position that Congress, in the HOLA, delegated to the Bank Board the authority to regulate the operations of federal savings and loan associations to the exclusion of state regulation. In *Meyers,* the court addressed the issue whether a Bank Board regulation specifically covering the area of prepayments of real estate loans, 12 C.F.R. Section 545.6-12(b), exempted federal associations from California law dealing with prepayment penalties. The court held that "federal law preempts the field . . ., so that any California law in the area is inapplicable to federal savings and loan associations operating within California." 499 F.2d at 1147.

IV BANK BOARD'S EXERCISE OF ITS AUTHORITY

Pursuant to the plenary authority delegated to it by Congress, the Bank Board has promulgated specific regulations regarding the provisions which a federal association shall and may include in their loan contracts. 12 C.F.R. § 545.6-11. In particular, the Bank Board has promulgated a regulation specifically confirming the validity of due-on-sale clauses in mortgage loan contracts executed by federal associations. 12 C.F.R. § 545.6-11(f). Further, the Bank Board has specifically provided that the only non-contractual limitations on the exercisability of such clauses are those enumerated in 12 C.F.R. § 545.6-11(g).[13] 12 C.F.R. § 545.6-11(f). The regulations on their face indicate the Bank Board's intent to exercise the authority to preempt delegated to it by Congress and to govern exclusively the validity and exercisability of due-on-sale clauses in the lending instruments of federal associations.

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[12] *See, e.g., City Federal Savings and Loan Ass'n v. Crowley, supra,* 393 F.Supp. at 655 ("The Act [HOLA] and the regulations promulgated by the [Bank Board] have been held to establish federal pre-emption over the regulation of federal savings and loan associations and thereby preclude any state legislation from applying."); *Lyons Savings and Loan Ass'n v. Federal Home Loan Bank Board, supra,* 377 F.Supp. at 17 ("[T]he plenary powers given to the Board in the HOLA clearly evidence a Congressional intention to preempt the field, thus precluding any regulation of federal associations by state law.").

The language of these cases suggests that Congress occupied the field so that, even in the absence of Bank Board regulation, the states are precluded from regulating in any way the operations of federal associations. That issue is not before the court on this motion and the court expresses no view as to its merits. However, the breadth of the position taken by these courts lends further support to the more limited conclusion reached in this opinion.

The Bank Board expressed its intentions with regard to the preemptive effect of the due-on-sale regulations in the preamble thereto:

> "[i]t was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by § 545.6-11 and the Board's new Statement of Policy. [12 C.F.R. § 556.9]. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in § 545.6-11(g) on the ground that such . . . avoidance of lim-

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[13] *See* note 3 *supra*. Section 545.6-11(g) contains the only express limitations on the exercise of due-on-sale clauses by federal associations. However, the Bank Board's Statement of Policy with respect to the use of due-on-sale clauses expresses the Bank Board's view that there may be circumstances other than those described in 12 C.F.R. § 545.6-11(g)(1) where a federal association should consider waiving its contractual right to accelerate. 12 C.F.R. § 556.9.

> itations is permissible under State law." Preamble to Bank Board Resolution No. 76-296, dated April 28, 1976.

The Bank Board, in promulgating these regulations, was responding to attempts by states to impose state limitations on federal associations' exercise of due-on-sale clauses. The Board deemed such limitations not to be the "best practices," and therefore specifically authorized due-on-sale clauses and preempted state regulation. In doing so, the Bank Board exercised precisely the kind of discretion that Congress intended to delegate to it in HOLA. State regulation of due-on-sale clauses, contained in the lending instruments of federal associations executed on or after June 8, 1976, is therefore preempted.

V CONCLUSION

Plaintiff's and cross-claimant's motion for partial summary judgment is granted. Federal law, including specifically 12 C.F.R. § 545.6-11(f) and (g), exclusively governs the validity and exercisability of due-on-sale clauses included in Glendale Federal's loan instruments executed on and after June 8, 1976. California law on the validity and exercisability of due-on-sale clauses is inapplicable to Glendale Federal's loan instruments executed on and after June 8, 1976.

Decision of the Central District Court Granting Summary Judgment in the *Fox* Action.

[481 F.Supp. 616 (1979)]

Glendale Federal Savings and Loan Association, a federally chartered association, Plaintiff, v. David H. Fox, etc., et al., Defendants. Federal Home Loan Bank Board, Cross-Claimant, v. Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Cross-Claim Defendant. No. CV 77-3274-WMB.

United States District Court, C. D. California. June 20, 1979. As Amended June 26 and Oct. 17, 1979.

Evelle J. Younger, Atty. Gen., Joesph M. O'Heron, W. Gary Kurtz, Deputy Attys. Gen., Los Angeles, Cal., for plaintiff.

McKenna & Fitting, G. Howden Fraser, Terry O. Kelly, Los Angeles, Cal., for defendants.

ORDER

WM. MATTHEW BYRNE, Jr., District Judge.

A "due-on-sale" clause in a loan instrument provides the lender an option to declare immediately due and payable all of the sums owed to the lender if all or any part of the real property securing the loan is sold or otherwise transferred by the borrower without the lender's prior consent.[1] This action involves the question whether state regulation of the validity and exercisability of due-on-sale clauses contained in the loan instruments of federal savings and loan associations executed after June 8, 1976, is preempted by federal law.

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[1] *See* 12 C.F.R. § 545.6-11(f), *infra*.

I. BACKGROUND

Plaintiff, Glendale Federal Savings and Loan Association ("Glendale Federal"), is a federally chartered savings and loan association organized and operating under the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1461, *et seq*. (hereinafter "HOLA"). The Federal Home Loan Bank Board ("the Bank Board") defendant and cross-claimant, is an independent agency of the United States in the Executive Branch, 12 U.S.C. Section 1437(b), which, under authority delegated by Congress through Section 5(a) of the HOLA, is responsible for the chartering, examining, supervision, and regulation of federal savings and loan associations. 12 U.S.C. § 1464(a).[2]

The Bank Board has promulgated regulations specifying the provisions which a federal savings and loan association shall and may include in its loan contracts. 12 C.F.R. § 545.6-11. With respect to the use of due-on-sale clauses by federal savings and loan associations the Bank Board, in April, 1976, adopted certain amendments specifically authorizing the use of such clauses and prescribing certain limitations on their exercise. 12 C.F.R. § 545.6-11(f) & (g). These regulations, which became effective June 8, 1976, state in pertinent part:

> "A federal association continues to have the power to include, as a matter of contract between it and the

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[2] Section 1464(a) of Title 12, United States Code, provides:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charter therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section . . . exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower . . ." 12 C.F.R. § 545.6-11(f).[3]

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[3] 12 C.F.R. § 545.6-11(g) provides:

"(1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following:

(a) Creation of a lien or other encumbrance subordinate to the association's security instrument;

(b) Creation of a purchase money security interest for household appliances;

(c) Transfer by devise, descent, or by operation of law upon the death of a joint tenant;

(d) Grant of any leasehold interest of three years or less not containing an option to purchase.

(2) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no Federal association shall impose a prepayment charge or equivalent fee in connection with the acceleration of the loan pursuant to the exercise of a due-on-sale clause.

(3) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association shall have waived its option to exercise a due-on-sale clause as to a specific transfer if, prior to that transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) reach written agreement that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its security instrument shall be at such rate as the association shall request. Upon such written agreement and resultant waiver, the association shall release such existing borrower from all obligations under the loan instruments, and for purposes of § 541.14(a), the association shall be deemed to have made a new loan to such existing borrower's successor in interest."

Defendants Fox, DeClercq, and Silberman (hereafter "state defendants") are, respectively, the Real Estate Commissioner of the State of California, a Deputy Real Estate Commissioner of the State of California, and the Secretary of the Business and Transportation Agency of the State of California. California real estate law requires that the Commissioner of Real Estate examine any proposed "subdivision,"[4] and, unless there are grounds for denial, issue to the subdivider a public report authorizing the sale or lease in California of the lots or parcels within the subdivision.[5] The sale or lease, or offer for sale or lease, of any lots or parcels contained in a subdivision without first obtaining such a public report is prohibited.[6] In connection with the examination of a proposed subdivision, the Real Estate Department requires that the developer of such subdivision identify any lender that will be providing take-out loans to prospective purchasers and submit to the Department sample copies of the lender's notes, deeds of trust, mortgages or other security instruments to be executed in connection with such take-out loans.[7]

In late June or early July, 1977, Glendale Federal agreed with the developer of a partially constructed forty unit condominium project located in California (the "Casa del Rey Project") to provide take-out loans to prospective purchasers of the units. Shortly thereafter, the developer of the

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[4] California Business and Professions Code § 11000.

[5] California Business and Professions Code § 11018 provides, in pertinent part:

> "The Real Estate Commissioner shall make an examination of any subdivision, and shall, unless there are grounds for denial, issue to the subdivider a public report authorizing the sale or lease in this State of the lots or parcels within the subdivision."

[6] California Business and Professions Code § 11018.2.

[7] *See* Regulations of the Real Estate Commissioner, Title 10, California Administrative.

Casa del Rey Project notified defendant DeClercq of the Department of Real Estate that Glendale Federal would be providing take-out loans to purchasers of units in the project and provided to DeClercq sample forms of Glendale Federal's standardized notes and deeds of trust.

In early August, 1977, Glendale Federal was contacted by a representative of the Casa del Rey Project and advised that the Department of Real Estate had determined that the standardized note and deed of trust forms of Glendale Federal were "illegal" and that Glendale Federal could not serve as the take-out lender on the project unless its note and deed of trust were revised. Thereafter, Glendale Federal was provided by the developer with a letter authored by DeClercq stating that "the sample form note and deed of trust do not conform to California Civil Code Section 2924.6, which limits the exercisability of due-on-sale clauses.[8] Concurrent with Glendale Federal's receipt of

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[8] California Civil Code § 2924.6 provides:

> "(a) An obligee may not accelerate the maturity date of the principal and accrued interest on any loan secured by a mortgage or deed of trust on residential real property solely by reason of any one or more of the following transfers in the title to the real property:
>
> (1) A transfer resulting from the death of an obligor where the transfer is to the spouse who is also an obligor.
>
> (2) A transfer by an obligor where the spouse becomes a co-owner of the property.
>
> (3) A transfer resulting for a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree which requires the obligor to continue to make the loan payments by which a spouse who is an obligor becomes the sole owner of the property.
>
> (4) A transfer by an obligor or obligors into an inter vivos trust in which the obligor or obligors are beneficiaries.
>
> (5) Such real property or any portion thereof is made subject to a junior encumbrance or lien.
>
> (b) Any waiver of the provisions of this section by an obligor is void and unenforceable and is contrary to public policy.
>
> (c) For the purposes of this section, 'residential real property' means any real property which contains at least one but not more than four housing units.
>
> (d) This act applies only to loans executed or refinanced on or after January 1, 1976."

DeClercq's letter, the association received written notice from the developer that in light of the position taken by the Department of Real Estate it would be unable to use Glendale Federal as the take-out lender on the Casa del Rey Project or on another project planned by the same developer.

Glendale Federal alleges in its complaint that defendants failed to issue a public report in this and other instances because the sample notes and deed of trust provided to the developer by Glendale Federal did not conform to California Civil Code Section 2924.6. The complaint seeks a judgment declaring that federal law exclusively governs the validity and exercisability of the "due-on-sale" clause utilized by Glendale Federal in its loan instruments, and an injunction restraining defendants from refusing to issue a public report under the Subdivided Lands Act, or refusing to act on an application for such a public report, on the ground that the notes or deeds of trust of Glendale Federal do not conform to California Civil Code Section 2924.6. Glendale Federal has abandoned its claim for injunctive relief in light of state defendants' statement that it is not now their policy to deny public reports on this basis.[9] *See United States v. W. T. Grant*, 345 U.S. 629, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

Defendants' motion to dismiss the action was denied on April 11, 1978. The Bank Board answered and admitted all the allegations of the complaint and filed a cross-claim against the state defendants. The cross-claim sought a declaratory judgment that federal law preempts state regulation of due-on-sale clauses both before and after the promulgation of 12 C.F.R. Sections 545.6-11(f) & (g).[10] On March 6, 1979, the court, with the consent of the Bank Board, dismissed that portion of the cross-claim that sought declaratory relief with regard to the pre-regulation period, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

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[9] *See* text at note 21, *infra*, and note 21.

On November 1, 1978, the court granted Glendale Federal's and the Bank Board's motion for partial summary judgment. The court held as follows:

> "Federal law, including specifically 12 C.F.R. § 545.6-11(f) & (g), exclusively governs the validity and exercisability of due-on-sale clauses included in Glendale Federal's loan instruments executed on and after June 8, 1976. California law on the validity and exercisability of due-on-sale clauses is inapplicable to Glendale Federal's loan instruments executed on and after June 8, 1976." *Glendale Federal Savings and Loan Ass'n v. Fox*, 459 F.Supp. 903, 912 (C.D.Cal.1978).

The court reasoned that "[t]he language, history, structure, and purpose of the Home Owners' Loan Act evidence a clear Congressional intent to delegate to the Bank Boad complete authority to regulate federal savings and loan associations and to preempt state regulation," and that the

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[10] The Board seeks a declaratory judgment stating that:

> "1. The Board's current regulation, 12 C.F.R. § 545.6-11, exclusively governs the validity and exercisability of due-on-sale clauses contained in mortgage instruments used by federal savings and loan associations in California;
>
> 2. Prior to the adoption of the Board's current regulation on the subject, due-on-sale clauses were permitted for federal savings and loan associations throughout the country under exclusive and controlling general regulations of the Board and/or the federal common law;
>
> 3. In the HOLA, the Congress delegated to the Board exclusive authority to regulate and supervise the lending practices of federal savings and loan associations throughout the country . . . ."

Bank Board, in promulgating 12 C.F.R. § 545.6-11(f) & (g), had exercised this preemptive authority. *Id.* at 910-12.

Glendale Federal and the Bank Board have now moved for summary judgment and entry of final judgment. They urge that the court's ruling on the motion for partial summary judgment and the court's denial of state defendants' motion to dismiss, which raised each of the affirmative defenses contained in state defendants' answer, dispose of all of the issues in the action and render entry of final judgment appropriate. State defendants contend that genuine issues of material fact remain with regard to their affirmative defenses. State defendants are correct in their contention that the court's denial of their motion to dismiss does not, in itself, dispose of any factual issues raised by their defenses. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Such issues may, however, be resolved on a motion for summary judgment. *See Simon v. Eastern Ky. Welfare Rights Organization, supra*, 96 S.Ct. at 1924, n. 15. State defendants have in fact offered no evidence by way of affidavit, deposition testimony, or exhibits that materially changes the posture of the issues raised by the motion to dismiss. For the reasons set forth below, the court finds that no genuine issue of material fact remains, that state defendants' affirmative defenses are without merit, and that final judgment should be entered in favor of Glendale Federal and the Bank Board.[11]

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[11] State defendants have at various times during this action raised several issues that the court believes may be disposed of summarily. First, state defendants have contended that Glendale Federal may, by its lending documents, have agreed to be bound by state law regardless of whether there is federal preemption. There is authority for the proposition that where a federal agency contracts with a private individual and specifically includes in the contract a provision that state law and not federal law governs the terms of the contract, state law may govern even in the face of general federal preemption.

However, even if this general principle were applicable to the situation here, the notes and deeds of trust involved in this action contain no reference to the law of California. State defendants' contention is therefore without merit.

Second, state defendants claim there remains an issue whether Bank Board regulations preempt certain regulations of the Department of Housing and Urban Development. 24 C.F.R. §§ 1710.25 and 1710.26 provide in part:

> § 1710.25 (a) Material filed with and found acceptable by State authorities charged with the responsibility of regulating the sale of lots in subdivisions may be accepted for filing by the Secretary as meeting the requirements of this part if the Secretary determines such action to be appropriate and such determination is set forth in § 1710.26. . . .
>
> . . . . .
>
> (d) The Secretary will examine the material filed with the State authorities and require such changes, additional information, documents or certifications as the Secretary determines to be reasonably necessary or appropriate in the public interest or for the protection of purchasers. The Secretary may refuse to accept any particular filing under this section when it is determined that acceptance is not in the public interest.

The provisions are permissive, not mandatory, and the Secretary may accept or reject any filing made in California. The regulation does not require that the Secretary accept for filing material accepted by California but in violation of Bank Board regulations. Nor does it address the Secretary's obligations with regard to filings rejected by California. There is no issue as to whether Bank Board regulations preempt these provisions.

Third, state defendants contend that, even if federal law preempts state regulation of due-on-sale clauses in loan instruments of federal associations, the real Estate Commissioner of the State of California retains discretion to deny public reports on any ground, including the ground that the take-out lender's sample notes and deeds of trust do not conform to California law. State defendants cite no authority for this proposition, and the court concludes that it is without merit. *See Sperry v. State of Florida*, 373 U.S. 379, 83 S.Ct. 1322, 1326, 10 L.Ed.2d 428 (1963).

Finally, state defendants claim there is an issue regarding the validity of 12 C.F.R. § 545.6-1(f) & (g). State defendants cite no authority again and do nothing more than assert that the issue exists. The issue is raised once by implication in a footnote to state defendants' opposition to the motion for partial summary judgment. The court concludes that state defendants have not challenged the validity of the regulations.

II. ELEVENTH AMENDMENT

State defendants contend that the Eleventh Amendment bars this action because Glendale Federal failed to exhaust its administrative remedies. Defendants rely primarily on *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). Assuming *arguendo* that failure to exhaust administrative remedies would be a bar to this action against state officials, the defense is not available to state defendants here because California law provides Glendale Federal with no administrative remedy for the wrong it alleges.

State defendants rely on California Business and Professions Code Section 11018.3, which provides an administrative remedy to "subdividers" objecting to the denial of a public report.[12] Glendale Federal is not a "subdivider" within the meaning of this section.[13] Further, Glendale Federal is not barred from bringing this action by the subdivider's failure to pursue any administrative remedy.

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[12] California Business and Professions Code §11018.3 provides:

> Any subdivider objecting to the denial of a public report or to denial by the commissioner of exemption from special regulation pursuant to Section 11000.5 may, within 30 days after receipt of the order of denial, file a written request for a hearing. The commissioner shall hold the hearing within 20 days thereafter unless the party requesting the hearing shall have requested postponement. If the hearing is not held within 20 days after request for a hearing is received plus the period of any such postponement or if a proposed decision is not rendered within 45 days after submission and an order adopting or rejecting such proposed decision is not issued within 15 days thereafter, the order of denial shall be rescinded and a public report issued.

[13] Although the chapter on Subdivided Lands of the Business and Professions Code itself provides no definition of "subdivider," Glendale Federal does not come within the conventional meaning of that term. For example, California Government Code § 66423 provides that, for the Subdivision Map Act, "subdivider" means a person, firm, corporation, partnership or association who proposes to divide, divides or causes to be divided real property into a subdivision for himself or for others. . . ." In *Cowell v. Clark*, 37 Cal.App.2d 255, 258, 99 P.2d 594, 596 (1940), the court defined "to subdivide" as used in the act from which the Subdivided Lands chapter was derived to mean "To divide a tract of land into lots to sell before developing or improving them."

III. VENUE

State defendants urge that venue is improper in the Central District of California. In response to state defendants' motion to dismiss, Glendale Federal argued that state defendants had waived their right to object to venue by entering into a stipulation for a temporary restraining order which stated that "any right, claim, or defense relating to the merits of the within action" was preserved. The right to object to improper venue can, under certain circumstances, be impliedly waived. *See* Wright & Miller, 5 Federal Practice and Procedure §1352, at 575-76. However, it would be stretching the language and intent of the parties too far to infer from the stipulation any such waiver of procedural defenses. The court finds that defendants have not waived their right to object to improper venue. The question remains whether venue is improper in this district.

Venue in this action is governed by 28 U.S.C. §1391(b), which provides:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

The defendants in this action all reside in the Northern and Eastern Districts of California.[14] Unless the claim arose in the Central District, venue is improper. State defendants contend that the claim arose in the Northern District of California, because "the events of which plaintiff complains'' occurred there. Glendale Federal argues that venue is proper in the Central District because Glendale Federal suffers the injury caused by state defendants' actions at its principal office, which is in this district.

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[14] Affidavits of John H. DeClercq, David H. Fox, and Richard T. Silberman, filed September 22, 1977.

The two principal tests employed to determine where a cause of action ''arose'' under Section 1391(b) are the ''weight of the contacts'' test and the ''place of injury'' test. The ''weight of the contacts'' test was first articulated in *Phildelphia Housing Authority v. American Radiator & S. San. Corp.*, 291 F.Supp. 252 (E.D. Pa. 1968), a case involving an alleged price-fixing conspiracy. Attempting to determine where a cause of action alleged to have touched a number of jurisdictions arose, the court wrote:

> ''It is submitted that 'where the claim arose' should be dependent upon where the contacts weigh most heavily. A 'weight of the contacts' test would enable venue to exist in a district where the injury occurred, if significant sales causing substantial injury were made to plaintiffs there by defendants. If some other overt act pursuant to the conspiratorial meetings took place in a district and it was a significant and substantial element of the offense, then venue would lie in that district. Conversely, if one insignificant sale was made in a district, as set forth above in the hypothetical, venue would not lie there. Similarly, if a meaningless and insignificant meeting of the conspirators took place in a certain district, venue would not [lie] there either.'' *Id.*, at 260-61.

The ''weight of the contacts'' test has been applied in a number of antitrust cases, e.g., *Redmond v. Atlantic Coast Football League,* 359 F.Supp. 666, 669-70 (N.D. Ind. 1973); *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 338 F.Supp. 812, 815-16 (E.D.Pa. 1972); *California Clippers, Inc. v. United States S. F. Ass'n,* 314 F.Supp. 1057, 1062-65 (N.D.Cal. 1970), in at least one trade-mark infringement case, *Hona Associates, Inc. v. Nozawa Trading, Inc.*, 374 F.Supp. 886, 890-92 (S.D.N.Y. 1974), in at least one corporate mis-management case, *British-American Insurance Company Ltd. v. Lee*, 403 F.Supp. 31, 36 (D.Del. 1975), and in a civil rights conspiracy case, *Kipperman v. McCone*, 422 F.Supp. 860, 877-79 (N.D. Cal. 1976). Several courts have suggested that the "weight of the contacts" test is most appropriately applied in cases where, due to the fact that the action arises from a multitude of similar acts performed throughout the country, the defendants are threatened with potentially unlimited venue. *Kipperman v. McCone, supra*, 422 F.Supp. at 878-79; *Honda Associates, Inc. v. Nozawa Trading, Inc., supra*, 374 F.Supp. at 891. The basic principle behind the test, however, that a district in which the parties and their activities have significant contacts is an appropriate forum for litigation between the parties, is applicable to all actions.

The "place of injury" test, originally applied primarily in tort actions, finds the claim to arise in the district in which the effect of the defendant's allegedly wrongful acts is felt. *Sheffield v. State of Texas*, 411 F.Supp. 709, 713 (N.D.Tex.1976); *Rosen v. Savant Instruments, Inc*, 267 F.Supp. 232 (E.D.N.Y.1967). In *Sheffield* plaintiffs challenged the constitutionality of the Texas Minimum School Foundation Grant Program, asserting that the program distributed state funds according to a formula based on erroneous land valuation. The court concluded that the claim arose in the district in which the effect of the program was felt by plaintiffs, not in the state capitol, where the program was enacted and administered. *Sheffield v. State of Texas, supra*, 411 F.Supp. at 713. In at least two cases in which a corporation has been injured, the "place of injury" has been found to be the company's principal place of business for the purpose of determining proper venue. *Iranian*

Shipping Lines, S. A. v. Moraites, 377 F.Supp. 644 (S.D.N.Y.1974); *Albert Levine Associates v. Bertoni & Cotti*, 314 F.Supp. 169 (S.D.N.Y.1970).

The "weight of the contacts" test and the "place of injury" test merge insofar as the place of injury necessarily depends on the location of the injured party, and the injury itself is a "contact." The court finds that in this case both the weight of the contacts and the place of injury are in the Central District of California. The specific denial of a public report alleged in the complaint took place in the Northern District of California but it related to a subdivision project located in that district. However, the course of conduct alleged in the complaint is pursued throughout California. Glendale Federal, the injured party, maintains its principal place of business in the Central District. All loans made by Glendale Federal are serviced from that office, in particular all decisions that Glendale Federal will make a construction loan or commit to make take-out loans on a development subject to the Subdivided Lands Act.[15] The economic affairs of the association are managed from Glendale Federal's main office. The injury that results to Glendale Federal if state defendants deny public reports to subdividers on the ground that Glendale Federal's sample note and deed of trust do not conform to California law, thereby precluding the association from serving as a take-out lender on developments in California, is felt primarily at Glendale Federal's principal office in the Central District. Further, the injury that results to the association due to the uncertainty as to whether California law applies to its loan instruments is felt at that office. The court therefore concludes that venue is proper in the Central District of California.

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[15] Affidavit of Donald P. Gelb, filed November 9, 1978.

IV. JURISDICTION

State defendants contend that Glendale Federal by its complaint seeks only to establish a defense of federal preemption to pending or potential state court actions to enforce state law, and that this court is therefore without jurisdiction.[16] This court disagrees.

The principle that a party may not create federal jurisdiction by seeking declaratory relief to confirm the validity of a potential federal defense to a state court action was first enunciated in *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). In *Wycoff*, the complaint sought a declaratory judgment that respondent's carriage of motion picture film and news-reels between points within Utah constituted interstate commerce and was therefore not subject to regulation by the state commission. The Supreme Court found that no existing controversy supported federal jurisdiction and ordered the action dismissed on that ground. *Id* at 241, 243, 73 S.Ct. 236. The Court commented at length on the propriety of declaratory relief in the case:

> "The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. . . . Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself

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[16] State defendants point primarily to *People v. Glendale Federal Savings and Loan Ass'n.*, Los Angeles Sup.Ct. Case No. C 147 921, as the pending action to which Glendale Federal seeks to establish a defense.

> involve a claim under federal law, it is doubtful if a federal court may entertain an action for declaratory judgment establishing a defense to that claim." *Id.* at 248, 73 S.Ct. at 242.

The doubt expressed by the Court in *Wycoff* has been applied by several courts as a bar to federal question jurisdiction. *Home Federal Savings and Loan Ass'n v. Insurance Dept. of Iowa*, 571 F.2d 423 (8th Cir. 1978); *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237 (3d Cir. 1972); *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971). *See also First Federal Savings and Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977).

Glendale Federal contends that the *Wycoff* rule does not bar this action for declaratory and injunctive relief because the "impending or threatened" state court action would arise under federal law. A state court action by state defendants for an injunction restraining Glendale Federal from including due-on-sale clauses in its loan instruments, on the ground that the clause violates California law, would not arise under federal law. No federal question could be raised in the complaint except in anticipation of a probable defense of federal preemption, and such anticipation would not create federal question jurisdiction. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 1004, 39 L.Ed.2d 209 (1974). Further, the action could not be removed to federal court on the basis of a defense of federal preemption. *Id. See, e.g., Home Federal Savings and Loan Association v. Insurance Dept. of Iowa, supra; State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972); *Borzello v. Charles D. Sooy*, 427 F.Supp. 332 (N.D.Cal.1977); *Johnson v. First*

Federal Savings and Loan Association of Detroit, 418 F.Supp. 1106 (E.D.Mich. 1976); *Marquette National Bank of Minneapolis v. First National Bank of Omaha*, 422 F.Supp. 1346 (D.Minn.1976). *But see Meyers v. Beverly Hills Federal Savings and Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974); *Rettig v. Arlington Heights*, 405 F.Supp. 819 (N.D.Ill.1975). Glendale Federal cannot avoid the *Wycoff* rule by claiming that its complaint attempts to establish a federal defense to a threatened state court action that would arise under federal law.[17]

Alternatively, Glendale Federal urges that this court has jurisdiction under the rationale of *Rath Packing Co. v. Becker, supra*. The opinion of the Court of Appeals for the Ninth Circuit in *Rath* casts considerable light on the meaning of *Wycoff*. In *Rath* state officials had filed several actions in state court seeking an injunction and civil penalties against the Rath company for acts of unfair competition, including distribution for sale of packages of bacon that California inspectors order off-sale. Rath filed an action in federal court seeking a declaratory judgment that federal law preempted the field and precluded application of the California packing regulations that were the basis of the off-sale order. The court examined the Supreme Court's opinion in *Wycoff*, writing:

> "The principle concern of the [*Wycoff*] Court was the nature of the controversy presented, 344 U.S. at 244, 73 S.Ct. at 240:
>
> > 'A multitude of rights and immunities may be predicated upon the premise that a business consists of

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[17] This court remanded *People v. Glendale Federal, supra* note 16, to state court precisely because the defense of federal preemption did not mean the case arose under federal law so as to create removal jurisdiction. *See People v. Glendale Federal Savings and Loan Ass'n*, CV 78-2296 (C.D.Cal.).

> interstate commerce. . . . We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is "*to guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." ' (emphasis supplied [by the Court]).
>
> . . . The Court was applying its concern that the controversy was not ripe for adjudication by pointing out a declaratory plaintiff may not create a controversy by seeking to have a federal court adjudicate federal defenses he might assert in a proceeding before a state court or administrative tribunal which is not ripe, but which is merely threatened or impending." 530 F.2d at 1304-05. (emphasis in original).

The court distinguished the controversy before it in *Rath* from that described in *Wycoff* on the basis that the off-sale orders in *Rath* had themselves created a controversy between the parties. The controversy "was not created by the institution of the state court actions against Rath, but arose independent thereof by virtue of the off-sale orders." *Id.* at 1305. There was thus more than "a possibility" of state action against *Rath*; such action had already been taken and was adversely affecting the company.[18]

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[18] Although *Wycoff* disapproves only of declaratory relief actions to establish federal defenses to "impending or threatened state court action," 73 S.Ct. at 248, courts have interpreted the Supreme Court's doubt to bar jurisdiction even where the state has already taken judicial action against the declaratory plaintiff in state court. *Home Federal Savings and Loan Ass'n v. Insurance Dept. of Iowa, supra; see First Federal Savings and Loan Ass'n of Boston v. Greenwald,* 591 F.2d 417, 423 n.8 (1st Cir. 1979). The court here relies on the denial of public reports by the state defendants, action analogous to the off-sale orders in *Rath,* rather than the pendency of the state's action in *People v. Glendale Federal, supra* note 16, in concluding that a controversy exists independent of any threatened state court action.

In this action, the controversy arose independent of any pending or threatened state court action, as a result of the defendants' denial of public reports. The action was brought by Glendale Federal not to guard against the possibility of state action, but to remedy state action already taken and adversely affecting Glendale Federal. The court therefore concludes that this court has subject matter jurisdiction over the action.[19]

V. CASE OR CONTROVERSY

State defendants contend there is no justiciable case or controversy as to two portions of the declaratory relief sought by Glendale Federal. First, they argue that no controversy exists with regard to the exercisability of due-on-sale clauses where the property securing the loan is sold outright, because California law regarding such situations is uncertain. Second, state defendants claim that any controversy with regard to denial of public reports by the Department of Real Estate is moot, because there is no threat of future enforcement against Glendale Federal. Both arguments are without merit.

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[19] The First Circuit has concluded that the rationale of *Rath Packing Co. v. Becker, supra,* supports jurisdiction in an action for declaratory relief where state and federal regulations currently in effect subject a savings and loan association to conflicting requirements. *First Federal Savings and Loan Ass'n of Boston v. Greenwald, supra,* 591 F.2d at 423 n.8. The First Circuit decided that the conflicting requirements presented a justiciable controversy independent of any enforcement action by state officials. *Id.* The district court in *First Federal* had found that the state regulation in question directly conflicted with and was preempted by federal law. *Id.* at 422. It is unclear to what extent the Court of Appeals relied on this finding in determining that the "conflicting requirements" created a controversy taking the action outside of *Wycoff.* This court need not and does not rely on any conflict between state and federal regulation in concluding that the court has jurisdiction.

A. *Outright Sale Situations*

In their motion to dismiss, state defendants suggested that state and federal law may not conflict with regard to the exercisability of due-on-sale clauses in "outright sale" situations, because the California Supreme Court specifically reserved any decision in that area in *Tucker v. Lassen Savings & Loan Ass'n,* 12 Cal.3d 629, 116 Cal.Rptr. 633, 526 P.2d 1169 (1974). Since that motion was filed, the California Supreme Court decided *Wellenkamp v. Bank of America,* 21 Cal.3d 943, 148 Cal.Rptr. 379, 582 P.2d 970 (1978), holding that "a due-on clause contained in a promissory note or deed of trust cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." *Id.*, 148 Cal.Rptr. at 385-86, 582 P.2d at 976-977. Any argument that no controversy exists as to "outright sale" situations, or that the federal courts should abstain pending a determination of state law, is therefore no longer available to state defendants. In any event, Glendale Federal by its complaint does not merely seek a declaration as to whether federal and state law regarding due-on-sale clauses are in conflict. Rather, it seeks a declaration that California law is inapplicable, whether or not it conflicts with federal law, in determining the validity and exercisability of due-on-sale clauses contained in Glendale Federal's loan instruments. The State of California has repeatedly contended in this case and elsewhere that California law does apply to such clauses.[20] The court finds that a controversy exists between the parties as to the applicability of California law to due-on-sale clauses contained in Glendale Federal's loan instruments, and that the controversy necessarily encompasses the question whether California law applies in an "outright sale" situation.

B. *Mootness*

State defendants contend that this action is moot because no threat exists that public reports will be denied in the future on the ground that the sample deeds and notes of Glendale Federal do not conform to Section 2924.6 of the California Civil Code. They claim that it is not now and never has been the policy of the California Department of Real Estate to deny public reports under the Subdivided Lands Act on that ground, and that the denials that led to this action were mistakes by the officials responsible.[21] However, defendants have not acknowledged that the denials of the public reports were unlawful or that California law does not apply to the due-on-sale clauses contained in Glendale Federal's sample deeds and notes. Further, they have not stated that they would not deny public reports in the future on the ground that the sample deeds and notes do not conform to Section 2924.6, were they to obtain a ruling in this or another court that California law does apply. The court does not believe that state defendants have demonstrated that this controversy is moot.

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[20] In their answer to Glendale Federal's complaint, state defendants allege that "Glendale Federal is bound by the applicable laws of the State of California with respect to the exercise of due on sale clauses contained in their deed of trust instruments." State Defendants' Answer to Complaint, filed May 11, 1978, p. 9. *In People v. Glendale Federal, supra* note 16, the State moved for summary judgment, seeking a declaration that Glendale Federal was subject to California Civil Code § 2924.6. The Attorney General of the State of California has also filed *amicus curiae* briefs in at least two other pending actions, urging that federal law does not preempt state regulation of federal savings and loan associations.

[21] Affidavits of John H. DeClercq, David H. Fox, and Richard T. Silberman, filed September 22, 1977.

In *United States v. W. T. Grant, supra*, the Supreme Court rejected the respondents' contention that, because the interlocks between the corporate directorates alleged in the complaint no longer existed and respondents had no intention of reviving them, the action was moot. The Court wrote:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . .
>
> *The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one*. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in deciding the appropriateness of granting an injunction against the now-discontinued acts." 73 S.Ct. at 897 (footnotes and citations omitted) (emphasis added).

Two recent opinions of the Court of Appeals for the Ninth Circuit clarify the mootness standard set out in *W. T. Grant*. *See Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977); *Seay v. McDonnell Douglass Corp.*, 533 F.2d 1126 (9th Cir. 1976).

In *Seay*, the plaintiffs claimed that a union was using dues to finance political campaigns over the protest of union members. After the action was filed, the union issued a new policy statement to the effect that union dues could not be used for political activities over the protest of union members and that members who objected could obtain a pro rata rebate. The court stated:

> "This is a case in which defendant voluntarily ceased its allegedly wrongful conduct after litigation had been instituted. The Supreme Court has held that under these circumstances, voluntary termination of allegedly wrongful conduct does not deprive a court of its power to act. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303, 1309 (1953). *The case should not be held moot unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'. Pacific Maritime Association v. IOWU*, 454 F.2d 262 (9th Cir. 1971), *cited with approval in Electrical Workers 77 v. Puget Sound Power and Light Co.*, 506 F.2d 523, 524 (9th Cir. 1974), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1429, 43 L.Ed.2d 674 (1975). In the instant case there is no assurance that the union will continue to abide by the provisions of Circular No. 669 once the present litigation is terminated. It has known of its obligation to provide for a rebate of fees used for political purposes . . . since 1961 . . . . In light of these circumstances it would be error for this court to conclude that this litigation is moot." 533 F.2d at 1130 (emphasis added).

In *Williams*, plaintiffs challenged the constitutionality of "Operation Zebra," a San Francisco police program involving the stopping, questioning, and frisking of male blacks in an effort to apprehend the Zebra killer. The original program guidelines were very broad, but new guidelines were issued which defendants claimed eliminated any constitutional defects and mooted the case. The Court of Appeals rejected that argument:

> "When events have permanently destroyed any possibility of repetition, the case is moot. *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 129, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, [1707], 40 L.Ed.2d 164 (1974). Similarly, when the chance of repetition is remote and speculative, there is no jurisdiction. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *Hall v. Beals*, 396 U.S. 45, 49, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969). 'The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.' *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303 (1958).
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> . . . . .
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> Applying this doctrine to the present case, we hold that the April 25 revised guidelines did not moot this legal action. Even if they did correct constitutional infirmities in the earlier directives, the April 25 guidelines did not end the controversy or divest the district court of the power to grant an injunction. Between April 17 and April 25, police officials issued at least six directives relating to the Zebra program. On this proven record of almost one new order per day, *there was no reason for the court to conclude that new, and possibly contradictory, pronouncements might not be issued within the next week*. In fact, the guidelines themselves suggested that they could be revised easily, and that the police officers could revert to their prior, allegedly unconstitutional practices." 549 F.2d at 142-43. (emphasis added).

The court reiterated the *Grant* Court's indication that "defendants have a heavy burden of showing that they will not revive their challenged conduct," and that "mere disclaimers are not satisfactory." Id. at 143.[22]

In *Uzzell v. Friday*, 401 F.Supp. 775 (M.D. N.C. 1975), *modified*, 547 F.2d 801 (4th Cir. 1977), *modified en banc* 558 F.2d 727 (4th Cir. 1977), *vacated and remanded*, 438 U.S. 912, 98 S.Ct. 3139, 57 L.Ed.2d 1158 (1978), a case relied on by defendants, two students had challenged the practice of a university of funding a discriminatory student organization. The university changed its policy and claimed the action was moot. The district court agreed, writing:

> "While there is some dispute as to the proper standard for finding mootness when the defendant has discontinued the challenged acts, 'the test of mootness is whether the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.' * * * As the commentators state, the prediction of possible recurrence of the challenged activity is often difficult and must to some degree depend on 'individualized judgment and intuition.' * * * However, in the area of official action, courts have been more receptive to declarations that abandoned

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[22] The *Williams* court concluded that the convictions of four defendants identified as the Zebra killers and the cessation of the homicides did moot the case. 549 F.2d at 142-43. The court wrote:

> "The likelihood that such a program will be used in the future in incalculable. Perhaps if the City were confronted with another series of unsolved homicides that frustrated normal investigative techniques, a large-scale program of stops, frisks, and questioning might reappear. As Chief Scott stated, the Police Department might again use Zebra-like guide lines in a similar situation. But the relevant question is: Is this situation likely to arise? Although we can imagine its recurrence, we cannot consider it more than a speculative possibility." *Id.* at 143-44.

Obviously, there is more than a speculative possibility that Glendale Federal will be involved in transactions in the State of California that involve its loan instruments.

> illegal policies will not be reinstated particularly when, as in this case, the challenged policy is terminated altogether and not just its application in particular circumstances." Id. at 779 (citations omitted).

The district court emphasized that the University had filed with the Department of Health, Education, and Welfare "clearly stated directives and policies . . . to terminate funding to any organization with discriminatory membership policies," and that the policy of the University had "come full circle to an unequivocal refusal to fund any racially exclusive organization." Id.[23]

State defendants have not met their burden of showing that there is "no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant, supra* 73 S.Ct. at 897. Instead, it appears that state defendants are seeking a ruling in their favor on the preemption issue, and if they obtain it here or elsewhere they may once again deny public reports under the Subdivided Lands Act on the ground that a take-out lender's sample notes and deeds of trust do not conform to California Civil Code Section 2924.6. State defendants have offered the court nothing more than a statement that the denials of the public reports in this case were "mistakes" and that it is not now the policy at the Department of Real Estate to make such denials. They have not acknowledged that the denials were unlawful, and they have not stated, as the defendants in *Uzzell* had, that they will not reinstitute the allegedly unlawful policy. The Court finds that there is a reasonable expectation that the allegedly wrongful conduct will recur and therefore concludes that the case is not moot.

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[23] The students had also challenged the constitutionality of restrictions based exclusively on race on appointments to the Campus Governing Council and the Student Honor Court. The district court granted summary judgment in favor of defendants on these claims on the ground that they did not state a case or controversy. *Uzzell v. Friday, supra*, 401 F.Supp. at 779-82. The Court of Appeals reversed and directed the district court to enter summary judgment in favor of plaintiffs. 547 F.2d at 803-05. The Supreme Court vacated the judgments and remanded the case for further consideration in light of *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). 98 S.Ct. 3139 (1978).

The court further notes that Glendale Federal and the Bank Board seek only declaratory relief, and that it is substantially more difficult to moot an action for declaratory rather than injunctive relief. In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974), the employer-plaintiffs sought an injunction restraining the state from making welfare payments to employees engaged in a strike, and a declaratory judgment that state interpretive regulations according public assistance benefits to striking workers were null and void. 94 S.Ct. at 1696-97. The Supreme Court agreed with the respondent union that the claim for injunctive relief was mooted by the termination of the strike, but concluded that the claim for declaratory relief was not mooted. *Id* at 1697-98. The Court wrote:

> "[E]ven though the case for an injunction dissolved with the subsequent settlement of the strike and the strikers' return to work, the parties to the principal controversy, that is, the corporate petitioners and the New Jersey officials, may still retain sufficient interests and injury as to justify the award of declaratory relief. The question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'." * * *
>
> . . . *[T]he challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse*

> *effect on the interests of the petitioning parties.*" *Id.* at 1698 (emphasis added).

State defendants' repeated contention that California law governs the validity and exercisability of Glendale Federal's due-on-sale clauses, and the possibility that the complained of conduct will recur, similarly have a "substantial adverse effect" on the interests of Glendale Federal and the Bank Board. The court concludes that the facts involved in this action satisfy the requirement of Article III, § 2 of the Constitution, and the Declaratory Judgment Act, that a case or controversy exist between the parties.

VI. PENDENCY OF STATE ACTIONS

State defendants have consistently urged this court to decline to exercise any jurisdiction over this action due to the pendency of litigation regarding the same issues in the California court.[24] The state court litigation upon which state defendants rely has a different factual genesis than this action, but involves nearly the identical legal controversy as to whether state regulation of due-on-sale clauses contained in loan instruments of federal savings and loan associations is preempted by federal law. The court nevertheless concludes that this is not an appropriate circumstance in which to decline to exercise its jurisdiction.

In *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court articulated the controlling legal standard to justify dismissal of an action in federal court where jurisdiction is properly invoked because of a concurrent proceeding in state court. The Court noted that "the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . .,' " and that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." 96 S.Ct. at 1246. Given this obligation, the Court wrote, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Id.* The Court then turned to a discussion of "exceptional" circumstances that might justify such a dismissal:

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[24] State defendants point again primarily to *People v. Glendale Federal, supra* note 16.

> "It has been held . . . that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against the exercise is required. . . . *Only the clearest of justifications will warrant dismissal.*" 96 S.Ct. at 1246-47 (citations omitted) (emphasis added).

The process required by the Court's decision is a balancing of equities, *see Puerto Rico International Airlines v. Silva Recio,* 520 F.2d 1342 (1st Cir. 1975), with the balance heavily weighted toward the federal courts' "unflagging" obligation to exercise the jurisdiction granted to them.

In this action, there is a possibility that the state and federal proceedings will be duplicative and that a conflict may arise between the state and federal courts. Both parties, however, have a substantial interest in having the issues presented by this action resolved, *see McGraw-Edison Co. v. Performed Line Products Co.*, 362 F.2d 339, 342 (9th Cir. 1966), and the federal court appears to have reached such a resolution with more deliberate speed than the state court. *See Wong v. Bacon,* 445 F.Supp. 1177, 1187-88 (N.D.Cal.1977). Further, the issues presented are exclusively issues of federal law, and the federal court is therefore neither an inconvenient nor an inappropriate forum. *See Wong v. Bacon, supra,* 445 F.Supp. at 1188. Given the extreme disinclination of the Supreme Court to sanction a refusal to exercise jurisdiction due to the pendency of concurrent state court litigation, this court concludes that, even without considering the presence of the Bank Board in the action, these circumstances do not justify such a refusal.

The presence of the Bank Board, a federal agency, in this litigation renders a refusal to exercise jurisdiction even less appropriate. A federal court may enjoin state judicial proceedings, notwithstanding the Anti-Injunction Act, 28 U.S.C. § 2283, "when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests.' " *Mitchum v. Foster,* 407 U.S. 225, 235-36, 92 S.Ct. 2151, 2158-59, 32 L.Ed.2d 705 (1972), *citing NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971); *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The rationale behind that exception to the Anti-Injunction Act applies with equal force to this action for declaratory relief.

In *NLRB v. Nash-Finch, supra*, Nash-Finch had successfully sought an injunction from a Nebraska state court restricting picketing by a labor union at its stores. The NLRB brought suit in federal court seeking to restrain enforcement of the state court injunction on the ground that it regulated conduct governed exclusively by the National Labor Relations Act. The Court of Appeals denied relief on the basis of the Anti-Injunction Act, and the Supreme Court reversed, holding that the Act impliedly allowed federal agencies to enjoin state action where the agency's power preempts state law. 92 S.Ct. at 377. The Court quoted from *Leiter Minerals, Inc. v. United States, supra*, 77 S.Ct. at 290-91, in stating the reason for the exception:

> " 'The statute is designed to prevent conflict between federal and state courts. . . . This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings . . . would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.' " 92 S.Ct. at 377-78.

The Court of Appeals for the Ninth Circuit has held that the exception to the Anti-Injunction Act applies when the United States or a federal administrative agency is enforcing applicable federal law. *SEC v. Wencke*, 577 F.2d 619 (9th Cir. 1978); *Puget Sound Gillnetters Ass'n v. U. S. District Court*, 573 F.2d 1123 (9th Cir. 1978). In a situation nearly identical to the one before this court, the First Circuit, relying on the *Nash-Finch* rationale, held that abstention from the exercise of jurisdiction is inappropriate where a federal agency asserts "superior federal interests" in a declaratory judgment action. *First Federal Savings and Loan Ass'n v. Greenwald, supra*, 591 F.2d at 424.

In *Greenwald*, the Bank Board was named as a defendant, not a plaintiff, in an action for declaratory relief against the Massachusetts Commissioner of Banks. The First Circuit concluded that the rationale behind *Nash-Finch* nevertheless applied.

> "It is true that the Bank Board is not a plaintiff in the declaratory judgment action, but rather was joined as a defendant along with the Commissioner. Despite that posture, however, the Bank Board has actively asserted its position that federal law, including its own regulations, exclusively governs the legal obligations of federally-chartered savings and loan associations to pay interest on escrow accounts. It has challenged the Commissioner's effort to enforce the Massachusetts statute in both its answer and its motion for summary judgment. There can be no doubt that the Bank Board is asserting what it perceives to be 'superior federal interests' in the declaratory judgment action. In this situation, the rationale of *Nash-Finch* and *Leiter Minerals* applies as well as if the Bank Board had brought its own lawsuit." Id.

In this action, the Bank Board has just as actively asserted its position that federal law exclusively governs the validity and exercisability of due-on-sale clauses in the loan instruments of federal savings and loan associations. The rationale behind *Nash-Finch*, as well as the result of the balancing process mandated by *Colorado River Water Cons. Dist. v. United States, supra*, preclude this court from declining to exercise its jurisdiction over this action for declaratory relief.

CONCLUSION

The court finds that no genuine issue of material fact remains in this action. Glendale Federal's and the Bank Board's motions for summary judgment are granted. Federal law, including specifically 12 C.F.R. § 545.6-11(f) & (g), exclusively governs the validity and exercisability of due-on-sale clauses included in the loan instruments of federally-chartered savings and loan associations executed after June 8, 1976. California law on the validity and exercisability of due-on-sale clauses does not apply to such loan instruments.

The foregoing shall be deemed findings of fact and conclusions of law.

Judgment will be entered in favor of plaintiff Glendale Federal Savings and Loan Association and cross-claimant Federal Home Loan Bank Board.

Decision of the Eastern District Court Granting Summary Judgment in the *Conference II* Action.

[495 F.Supp. 12 (1979)]

Conference of Federal Savings and Loan Associations, a California Corporation; and Alameda Federal Savings and Loan Association; Bay View Federal Savings and Loan Association; California Federal Savings and Loan Association; Coast Federal Savings and Loan Association; Eureka Federal Savings and Loan Association; First Federal Savings and Loan Association of San Diego; First Federal Savings and Loan Association of Santa Monica; First Federal Savings and Loan Association of South Pasadena; Home Federal Savings and Loan Association of San Diego; Orange Belt Federal Savings and Loan Association; Pacific Federal Savings and Loan Association; Peoples Federal Savings and Loan Association; Pomona First Federal Savings and Loan Association; Provident Federal Savings and Loan Association of Riverside; Redlands Federal Savings and Loan Association; Republic Federal Savings and Loan Association; San Francisco Federal Savings and Loan Association; Santa Fe Federal Savings and Loan Association; The Heart Federal Savings and Loan Association; and Western Federal Savings and Loan Association, each of which is an association organized and operating as an instrumentality of the United States of America pursuant to Section 5(a) of the Home Owners' Loan Act of 1933, as amended [12 U.S.C. § 1464(a)], Plaintiffs, v. Alan L. Stein, Successor in Office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California; and the Federal Home Loan Bank Board, Defendants. Civ. No. S 78-55-PCW.

United States District Court, E. D. California. Nov. 2, 1979.

G. Howden Fraser, McKenna & Fitting, Los Angeles, Cal., for plaintiffs.

Joseph M. O'Heron, Deputy Atty. Gen., Richard M. Mosk, Los Angeles, Cal., for defendant and cross-defendant Secretary of the Business and Transp. Agency of the State of California.

Harvey Simon, Asst. Gen. Counsel, Federal Home Loan Bank Bd., Washington, D.C., for defendant and cross-claimant Federal Home Loan Bank Bd.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WILKINS, Chief Judge.

On August 20, 1979, hearings were held before the Honorable Philip C. Wilkins, Judge of the United States District Court for the Eastern District of California, on various Motions of the parties to the above entitled action and cross-action, namely:

1. Plaintiffs' Motion for Summary Judgment on Behalf of Plaintiffs, [F.R.C.P. Rule 56], dated March 8, 1979;
2. Defendant and cross-claimant's Motion For Summary Judgment on Behalf of Defendant and Cross-Claimant Federal Home Loan Bank Board, dated March 22, 1979; and
3. Defendant's Motion for Equitable Abstention, dated June 18, 1979.

Terry O. Kelly, Esq., of the law firm of McKenna & Fitting, appeared at such hearing on behalf of plaintiffs; Richard M. Mosk, Esq., of the law firm of Mitchell, Silberberg & Knupp, W. Gary Kurtz, Esq., of the law firm of Lipofsky & Schulman, Inc., and Joseph M. O'Heron, Esq., Deputy Attorney General of the State of California, appeared thereat on behalf of the defendant and cross-defendant Secretary of the Business and Transportation Agency of the State of California; and Harvey Simon, Esq., Assistant General Counsel of the Federal Home Loan Bank Board, appeared thereat on behalf of the defendant and cross-claimant Federal Home Loan Bank Board.

The Court, having read the memoranda submitted by the parties on such motions and having heard argument by counsel, thereafter orally announced its intended decision to grant the aforementioned Motions of plaintiffs and of defendant and cross-claimant Federal Home Loan Bank Board, and to deny the aforementioned Motion of Defendant and cross-defendant.

FINDINGS OF FACT

1. For purposes of these Findings of Fact and the following Conclusions of Law based thereon:

(a) "Conference" shall mean plaintiff Conference of Federal Savings and Loan Associations;

(b) "Plaintiff Federal associations" shall mean those Federal savings and loan associations hereinabove named as plaintiffs and those other Federal association members of the Conference which have their principal offices and operations within California and which are not hereinabove named as plaintiffs;

(c) "Secretary" shall mean the Secretary of the Business and Transportation Agency of California, who at the time of commencement of this action was defendant and cross-defendant Richard T. Silberman;

(d) "Bank Board" shall mean defendant and cross-claimant Federal Home Loan Bank Board;

(e) "HOLA" shall mean the Home Owners' Loan Act of 1933 as amended (12 U.S.C.A. § 1461 *et seq.*);

(f) "due-on-sale" clause shall mean a provision in a loan instrument which provides the lender an option to declare immediately due and payable all of the sums owed to the lender if all or any part of the real property securing the loan is sold or otherwise transferred by the borrower without the lender's prior consent.

2. The Conference sues defendants herein on behalf of itself as a trade association and for the benefit of its Federal association members having their principal offices and operations in California.

3. At all times relevant hereto, each of the plaintiff Federal associations was, and now is, (i) a Federally-chartered savings and loan association organized and existing under and pursuant to HOLA and the various regulations promulgated thereunder, and (ii) subject to the continuing supervision and directives of the Bank Board.

4. At all times relevant hereto, the Secretary had, and now has (i) control and supervision of the California Department of Savings and Loans and of the formation and operation of California state-chartered savings and loan associations, and (ii) is charged with the responsibility for enforcing the California statutes relating to state-chartered savings and loan associations.

5. At all times relevant hereto, the Bank Board was, and now is, (i) a Federal agency and instrumentality, and (ii) under Federal law, and specifically HOLA, exercising plenary supervisory and regulatory authority over the operations of Federally-chartered savings and loan associations.

6. At all times relevant hereto, and since 1948, there has existed a federal regulation requiring federal savings and loan associations to use and employ mortgage loan contracts which provide for the "full protection" of such associations; and, at all times since June 8, 1976, such a "full protection" provision has been found in 12 C.F.R. § 545.6-11(a).

7. At all times relevant hereto, the Federal Home Loan Bank Board has concluded that the ability to include "due-on-sale" clauses in the mortgage loan documents of Federal savings and loan associations, as well as the ability to use and exercise such "due-on-sale" clauses when included in such mortgage loan documents, is necessary for the "full protection" of such Federal savings and loan associations.

8. On or about July 30, 1975, pursuant to an order of the United States District Court for the Central District of California entered in the case entitled *Eric R. Schott v. Mission Federal Savings and Loan Association, et al.*, Civ. 75-366-WMB, U.S.D.C. C.D.Cal., the Bank Board issued an Advisory opinion (Bank Board Resolution No. 75-647; hereinafter the "*Schott* Opinion"). The *Schott* Opinion found that Federal law exclusively governs the validity of due-on-sale clauses in the loan instruments of Federal savings and loan associations in California and that such Federal associations are not required to comply with California law with respect to such due-on-sale clauses.

9. On January 14, 1976, the Secretary commenced Civil Action No. C 147921 (entitled "*People of the State of California, etc. v. Glendale Federal Savings and Loan Association, et al.*") in the Superior Court of the State of California for the County of Los Angeles against Glendale Federal Savings and Loan Association ("Glendale Federal"), a Federally-chartered savings and loan association doing business in the State of California and a member of the Conference, to obtain declaratory and injunctive relief against Glendale Federal for its alleged non-compliance with the California law and regulation with respect to the validity and exercisability of due-on-sale clauses.

10. On or about June 8, 1976, the Bank Board promulgated a Federal regulation (12 C.F.R. § 545.6-11(f) and (g) expressly authorizing Federal associations to use and

exercise due-on-sale clauses in their mortgage loan contracts exclusive of restrictions by state law. Said regulation expressly states that Federal associations "continue to have the power to include" due-on-sale clauses in their mortgage loan instruments.

11. 12 C.F.R. § 545.6-11(f) was promulgated by the Bank Board for the purpose of clarifying the pre-existing Federal law with respect to the validity and enforceability of due-on-sale clauses in the loan instruments of Federally-chartered savings and loan associations. The Bank Board's purpose and intent is clearly demonstrated by the language of the regulation.

12. There is, with respect to the regulation of due-on-sale clauses in the loan instruments of Federally-chartered savings and loan associations, a pervasive scheme of Federal regulation as well as a great need for national uniformity.

13. On or about November 7, 1978, in *Glendale Federal Savings and Loan Association v. Fox et al.*, 459 F.Supp. 903, the United States District Court for the Central District of California granted a partial summary judgment in favor of the Bank Board and Glendale Federal and against the Secretary. Thereafter, on June 21, 1979, the Court entered final judgment in favor of the Bank Board and Glendale Federal and against the Secretary.

14. A continuing, actual and bona fide controversy exists between the plaintiffs, the Secretary and the Bank Board concerning whether the Secretary has the power and authority to supervise and regulate, and to enforce supervision and regulation, of the due-on-sale clauses and practices of the plaintiff Federal associations and, further, concerning whether the plaintiff Federal associations must comply with California statutes and law with respect to the validity and exercisability of due-on-sale clauses.

15. There is no just reason for this Court to exercise its discretion to abstain from determining this controversy and a sound basis exists for the Court to go forward at this time.

16. An immediate declaration of the Bank Board and the plaintiff Federal associations' respective rights and duties in the premises of the conflicting claims and contentions of law and of regulatory and supervisory authority being made by and between the Secretary and the Bank Board in respect to the due-on-sale clauses and practices of the plaintiff Federal associations is required in order to prevent substantial and continuing burden and uncertainty to the plaintiff Federal associations in the conduct of their respective businesses and, further, to prevent interference with the Bank Board's regulation of due-on-sale clauses and practices of the plaintiff Federal associations.

17. The Bank Board is a party to this action which, by its cross-claim herein, is asserting "superior federal interests" within the meaning of *First Federal Savings and Loan Association of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979). *See also, Rath Packing Company v. Becker*, 530 F.2d 1295 (9th Cir. 1975).

18. Any finding of fact herein which is actually a conclusion of law shall be deemed to be a conclusion of law.

CONCLUSIONS OF LAW

1. The controversy described in Finding of Fact No. 14 is one arising under HOLA. HOLA is an Act of Congress regulating commerce within the meaning of 28 U.S.C. Section 1337.

2. This Court has subject matter jurisdiction over the Complaint herein under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1337.

3. This Court has both ancillary and independent jurisdiction over the Cross-claim herein under 28 U.S.C. Section 1331, 28 U.S.C. Section 1337 and 28 U.S.C. Section 1345. The Bank Board is authorized to prosecute its Cross-claim herein under Section 5(d)(1) of HOLA.

4. The Conference is a proper party plaintiff to this action and has standing to bring and prosecute this action on behalf of itself and for the benefit of its Federal association members having their principal offices and operations in California.

5. The plaintiffs and the Bank Board are entitled to a declaratory judgment against the Secretary in respect to the controversy described in Finding of Fact No. 14.

6. The Secretary is estopped from relitigating in this Court the issue of whether Federal law, including specifically 12 C.F.R. §545.6-11(f) and (g), exclusively governs the validity and exercisability of due-on-sale clauses included in the loan instruments of Federally-chartered savings and loan associations executed on or after June 8, 1976. *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D.Cal.1978).

7. The Secretary is estopped from relitigating in this Court the issue of whether California law on the validity and exercisability of due-on-sale clauses is applicable to the loan instruments of Federally-chartered savings and loan associations executed on or after June 8, 1976. *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D.Cal.1978). See also, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

8. The Congress of the United States in HOLA granted to the Bank Board plenary powers to provide, under such rules and regulations as the Bank Board may prescribe, for the organization, incorporation, operation, examination,

and regulation of the plaintiff Federal associations and the Congress directed the Bank Board to give primary consideration to the best practices of local mutual thrift and home financing institutions in the United States. 12 U.S.C. Section 1464(a). *Meyers v. Beverly Hills Savings and Loan Association*, 499 F.2d 1145 (9th Cir. 1974).

9. The language, history and structure of HOLA evidence a clear Congressional intent to delegate to the Bank Board, the exclusive authority to regulate the lending practices of the plaintiff Federal associations and the regulations of the Bank Board have the full force and effect of law. *Meyers v. Beverly Hills Savings and Loan Association*, 499 F.2d 1145 (9th Cir. 1974); *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D.Cal.1978).

10. It was the intent of Congress that Federal law and regulation exclusively govern the validity and exercisability of due-on-sale clauses in the loan instruments of Federally-chartered savings and loan associations. *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D.Cal.1978) and *Nalore v. San Diego Federal Savings and Loan Association*, Civil No. 77-0660-N. See also, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978).

11. 12 C.F.R. §545.6-11(f) and (g) are Federal regulations which have the force and effect of law and which exclusively govern the validity and exercisability of due-on-sale clauses in loan instruments of the plaintiff Federal associations which were executed on and after June 8, 1976.

12. Previous interpretations of law by the Bank Board, including the *Schott* Opinion, are consistent with and restate the pre-existing Federal law with respect to due-on-sale clauses and practices.

13. The *Schott* Opinion is an interpretation of a regulation by an administrative agency, is wholly consistent with the regulation (12 C.F.R. § 545.6-11(a)) and is not plainly erroneous. It is therefore entitled to controlling weight in this Court. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

14. Federal law exclusively governs the validity and exercisability of due-on-sale clauses included in the loan instruments of Federally-chartered savings and loan associations whether such instruments were executed before or after the effective date of 12 C.F.R. § 545.6-11(f) and (g).

15. The Bank Board's exercise of its plenary regulatory power granted by Congress under HOLA preempts legislation by the State of California which attempts to subject Federal savings and loan associations in California to state law and regulation in the area of due-on-sale clauses and practices.

16. California law with respect to the validity and exercisability of due-on-sale clauses in the loan instruments of the plaintiff Federal associations is inapplicable whether such instruments were executed before or after the effective date of 12 C.F.R. § 545.6-11(f) and (g).

17. The Secretary has no power or authority to require or enforce compliance by the plaintiff Federal associations with California statutes and law relating to due-on-sale clauses and practices.

18. In light of this Court's granting summary judgment to plaintiffs and to the Bank Board in respect to the controversy described in Finding of Fact No. 14 and this Court's directing entry of a final judgment thereon, the preliminary

injunction requested by the Bank Board in its cross-claim is unnecessary.

19. Any conclusion of law herein which is actually a finding of fact shall be deemed to be a finding of fact.

20. Let final judgment in favor of the plaintiffs and the Bank Board and against the Secretary be entered in accordance herewith.

Order of the Ninth Circuit Submitting the *Fox* and *Conference II* Appeals.

Order.

In the United States Court of Appeals for the Ninth Circuit.

John F. Nalore and Norma L. Nalore, Plaintiffs-Appellants, vs. San Diego Federal Savings and Loan Association, a corporation and California Mortgage Service, Inc., a corporation, Defendants-Appellees, and Glendale Federal Savings and Loan Association, a federally chartered association, Plaintiff-Appellee, vs. David H. Fox, etc., et al., Defendant-Appellant, and Conference of Federal Savings and Loan Associations, a California corporation, et al., Plaintiffs-Appellees, vs. Alan L. Stein, successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Defendant-Appellant, Federal Home Loan Bank Board, Cross-Claimant-Appellee, vs. Alan L. Smith, etc., Cross-Defendant-Appellant. CA No. 79-3481, DC# Cv77-0660LCN. CA No. 79-3573, DC# Cv 77-3274WMB. CA No. 79-4818, DC# Cv78-55PCW.

Before: WRIGHT, CHOY and FERGUSON, Circuit Judges.

Filed July 30, 1981.

IT IS ORDERED that these causes be submitted on this date.

DATED JULY 27, 1981.

Article I, Section 8, Clause 3 of the United States Constitution (“The Commerce Clause”)

“[Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”.

Article VI, Clause 2 of the United States Constitution ("The Supremacy Clause")

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a):

As originally enacted:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Home Owners' Loan Act, ch. 64, §5(a), 48 Stat. 132 (1933).)

In its present form:

> "(1) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' or 'Federal mutual savings banks' (but only in the case of institutions which, prior to conversion, were State mutual savings banks located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. An association which was formerly organized as a savings bank under State law may not convert from the mutual to the stock form of ownership. An association which was formerly organized as a sav-

ings bank under State law may not convert from the mutual to the stock form of ownership. An association which was formally organized as a savings bank under State law may, to the extent authorized by the Board, continue to carry on any activities it was engaged in on December 31, 1977, and to retain or make any investments of a type it held on that date, except that its equity, corporate bond, and consumer loan investments may not exceed the average ratio of such investments to total assets for the five-year period immediately preceding the filing of an application for conversion and such an association which was formerly organized as a savings bank under State law shall only be permitted to establish branch offices and other facilities in accordance with the limitations imposed by State law controlling applications of a savings bank organized under such State law, provided that such an association: (A) shall be exempt from any numerical limitations of State law on the establishment of branch offices and other facilities, and (B) may, in any case, subject to the approval of the Board, establish branch offices and other facilities in its own Standard Metropolitan Statistical Area, its own county or within thirty-five miles of its home office, but only in its State of domicile. An association which was formerly organized as a savings bank under State law shall be subject to the requirements of State law (including any regulations promulgated thereunder and any sanction of the violation of any such law or regulation) in effect at the time of conversion, in the State of its original charter —

(A) pertaining to discrimination in the extension of home mortgage loans or adjustment in the terms of mortgage instruments based on neighborhood or geographical area,

(B) pertaining to requirements imposed under the Consumer Credit Protection Act,

if the Board determines that State law and regulations impose more stringent requirements than Federal law and regulations.

(2) A Federal mutual savings bank may make commercial, corporate, and business loans except that —

(A) not more than 5 per centum of the assets of such a bank may be so loaned; and

(B) such loans may only be made within the State where the bank is located or within 75 miles of the bank's home office.

(3) In addition to the authority conferred by paragraph (1), Federal mutual savings bank may accept demand deposits in connection with a commercial, corporate, or business loan relationship." (12 U.S.C.A. §1464(a) (1980).)

Federal Home Loan Bank Board Resolution No. 76-100

[41 Fed. Reg. 6283 (1976)]

[in pertinent part]

FEDERAL SAVINGS AND LOAN SYSTEM
LATE CHARGES AND DUE ON SALE CLAUSES

February 6, 1976.

The following summary of the amendment proposed by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the proposed amendment.

I. *Present situation.* The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts, to assess, impose, and collect late charges respecting delinquent periodic installment payments on such loans, and to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the loan without the consent of the association.

II. *Proposed Regulation.* A. Would continue to empower a Federal association to include, as a matter of contract between it and the borrower, provisions in its loan contracts for assessment, imposition, and collection of a late charge respecting any delinquent periodic installment payment on the loans, and for the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without the prior written consent of the association.

B. Would place specified limits on the maximum amount of late charges which could be collected by a Federal association on future contracts as to loans on the security of a home (1-4 family) occupied or to be occupied by the borrower.

C. Would restrict the circumstances under which a Federal association could exercise its acceleration option (due on sale clause) on future contracts as to loans on the security of a home (1-4 family) occupied or to be occupied by the borrower.

III. *Reasons for Proposed Change*. A. To clarify the existing authority of Federal associations to assess, impose, and collect late charges, and to set limits on late charges which can be collected by Federal associations on future loans on the security of a home occupied or to be occupied by the borrower.

B. To clarify the existing authority of Federal associations to exercise due on sale clauses, and limit the circumstances under which such clauses can be exercised on future loans on the security of a home occupied or to be occupied by the borrower.

LATE CHARGES

[Omitted]

DUE ON SALE

It is the position of the Board that "due on sale" clauses are authorized for Federal associations under §545.6-11, the Board regulation governing the terms of the loan documents used by Federal associations.

While there are may [sic] variants of the "due on sale" clause in common use in security transactions in real property, they typically provide for the acceleration of the maturity of the loan — at the option of the lender — upon the sale or transfer by the borrower of all or any part of the real property securing the loan, unless the lender has given its prior consent to such sale or transfer.

There are three commonly assigned reasons underlying the exercise of "due on sale" clauses. Such clauses enable the lending savings and loan association to —

(1) Ensure that the real property securing its loan is not sold, subject to its loan, to a person of doubtful financial stability, and to assure that its loan is not assumed by a new purchaser whom the association does not consider to be creditworthy;

(2) Adjust its loan portfolio towards current market rates, thus safeguarding and protecting the financial stability of the association and permitting it to make new home loans at lower interest rates than otherwise would be necessary to maintain an adequate yield on its mortgage portfolio; and

(3) Sell its existing home loans in the secondary mortgage market in an orderly manner, thereby generating substantial new funds for additional residential loans, which otherwise would be unavailable.

The Board believes that a contractual ability to repay the loan and property [sic] exercisable by a Federal association for any of the foregoing reasons. The Board is of the view that the financial security and stability of Federal associations would be endangered if the loan is, as a practical matter, assumed by a new borrower without credit underwriting by the association in connection with the sale of the security property. If the security property is transferred to a person whose ability to repay the loan and properly maintain the property is inadequate, the Board believes that the lending association's ability to protect its vital security interest is endangered. The Board also is of the view that elimination of the due on sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally. The Board is concerned that such higher rates and/or charges could adversely affect home buyers generally, and particularly younger families who are purchasing their first home — the group which ordinarily can least afford the additional expenses. The Board further is of the view that elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans, which otherwise would be available. Any such reduction would adversely affect home buyers, the house industry and the national economy. Lastly, the Board is of the view that elimination of the due on sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers.

The Board notes that the majority of courts which considered the matter have upheld the validity of due on sale clauses used by savings and loan associations. However, recently the authority of Federal associations to exercise their contractual due on sale clauses has been the subject of controversy and litigation in certain States. Therefore, the Board deems it desirable to amend §545.6-11 to clarify the existing authority of Federal associations to include due on sale clauses in their loan contracts with borrowers and to exercise such clauses. The Board also deems it desirable to include in such amendment limitations on the exercise by Federal associations of their existing due on sale authority as to certain future loans.

Paragraph (f) of the proposed amendment would provide that a Federal association continues to have the power to include, solely as a matter of contract between it and its borrowers, provisions in its loan contracts and/or loan instruments whereby the association may, at its option, declare the entire amount of the loan is immediately due and payable if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Paragraph (f) would provide further that, except as provided in paragraph (g) with respect to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrower, the exercise by a Federal association of any option to accelerate the maturity of its existing or future loans in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association shall be exclusively governed by the terms of the loan contract between such association and the borrower, and that all rights and remedies of the association and borrower respecting such acceleration shall be fixed and governed by said loan contract. The provisions of paragraph (f) would apply to any sale or transfer of the loan security property by the borrower, except for the specific transactions delineated in paragraph (g), including any sale or transfer through an installment, land contract or similar means of sale.

Paragraph (g) of the proposed amendment would provide three limitations on a Federal association's contractual right to exercise due on sale clauses as to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrowers. First, a Federal association's contractual option to accelerate the maturity of the loan in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association would not apply to, and would exclude, the following transactions respecting the loan security property: (i) the creation of a lien or encumbrance subordinate to the association's mortgage or deed of trust; (ii) the creation of a purchase money security interest for household appliances; (iii) a transfer by devise, descent or by operation of law upon the death of a joint tenant; or (iv) the grant of any leasehold interest of three years or less not containing an option to purchase.

Second, a Federal association would waive any contractual option to accelerate if, prior to the sale or transfer of the loan security property, the association and the person to whom the property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its note, mortgage and/or deed of trust shall be at such rate as the association shall request. The Board anticipates that the association will request a rate consistent with the then prevailing rate charged by the association on loans of similar amount and maturity with respect to similar types of security property to borrowers of similar credit-worthiness. Further, if the Federal association has waived its option to accelerate as provided in paragraph (g), and if the borrower's successor in interest has executed a written assumption agreement of the loan accepted in writing by the association, the association would release the borrower from all obligations under the note, mortgage and/or deed of trust securing the loan, and solely for the purpose of §541.14(a) of the Federal Regulations the association would be deemed to have made a new loan to the borrower's successor in interest.

The foregoing limitations on the exercise of due on sale clauses closely parallel the provisions contained in the standard loan documents used jointly by the Federal Home Mortgage Corporation and the Federal National Mortgage Association. Thus, many Federal savings and loan associations throughout the Nation already are following such limitations on the exercise of due on sale clauses in connection with billions of dollars in residential home loans which they originated and sold — in whole or in part — to the Federal Home Loan Mortgage Corporation or to the

Federal National Mortgage Association and to the Government National Mortgage Association.

Third, a Federal association would be precluded from imposing a prepayment penalty, or equivalent charge, on the borrower upon the acceleration of the maturity of the loan, and the payment thereof by the borrower, due to the exercise by the association of its contractual due on sale clause.

Aside from the three limitations set forth above, Federal associations may elect, as they have done in the past in individual cases, to waive their contractual due on sale rights when, in their judgment, unusual hardships exist respecting particular borrowers.

Interested persons are invited to submit written data, views and arguments to the Office of the Secretary, Federal Home Loan Bank Board, 320 First Street, N.W., Washington, D.C. 20552, by March 22, 1976, as to whether this proposal should be adopted, rejected, or modified. Written material submitted will be available for public inspection at the above address.

The Federal Home Loan Bank Board considers it desirable to amend Part 545 of the rules and regulations for the Federal Savings and Loan System (12 CFR Part 545), for the purposes described below. Accordingly, the Board hereby purposes to amend said Part 545 by adding new paragraphs (d), (e), (f) and (g) to §545.6-11, to read as set forth below.

§545.6-11 LOAN CONTRACT.

(d) [Omitted]

(e) [Omitted]

(f) *Due on sale clauses.* A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan contract and/or loan instruments whereby the Federal association may, at its option, declare the entire amount of the loan immediately due and payable if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrower, the exercise by a Federal association of any option to accelerate the maturity of existing or future loans in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association shall be governed exclusively by the terms of the loan contract between the association and the borrower, and all rights and remedies of the association and borrower respecting such acceleration shall be fixed and governed by said loan contract.

(g) *Limitations on the exercise of due on sale clauses.* (1) With respect to any loan made after May 31, 1976, on the security of a home (as defined by §541.10-2) occupied or to be occupied by the borrower, a Federal association's contractual option to accelerate the maturity of the loan in the event of a sale or transfer by the borrower of all or any party of the loan security property without the prior written consent of the association shall not apply to, and shall exclude, the following transactions respecting the loan security property:

(i) The creation of a lien or encumbrance subordinate to the association's mortgage or deed of trust;

(ii) The creation of a purchase money security interest for household appliances;

(iii) A transfer by devise, descent or by operation of law upon the death of a joint tenant; or

(iv) The grant of any leasehold interest of three years or less not containing an option to purchase.

(2) Further, with respect to any aforesaid loan made after May 31, 1976, no Federal association shall impose a prepayment penalty, or equivalent charge, on the borrower upon the acceleration of the maturity of the loan, and the payment thereof by the borrower, due to the exercise by the association of its contractual option to accelerate as a result of the sale or transfer by such borrower of all or any part of the loan security property without the written consent of the association. With respect to loans governed by this paragraph, a Federal association shall have waived any contractual option to accelerate if, prior to the sale or transfer of the loan security property, the association and the person to whom the property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its note, mortgage and/or deed of trust shall be at such rate as the association shall request. If the Federal association has waived its option to accelerate as provided in this paragraph, and if the borrower's successor in interest has executed a written assumption agreement of the loan accepted in writing by the association, the association shall release the borrower from all obligations under the note, mortgage and/or deed of trust securing the loan, and solely for the purpose of §541.14(a) the association shall be deemed to have made a new loan to the borrower's successor in interest.

(Sec. 5, 48 Stat. 132, as amended; 12 U.S.C. §1464, Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071)

By the Federal Home Loan Bank Board.

[SEAL]

J.J. Finn,
Secretary.

Federal Home Loan Bank Board Resolution No. 76-296

[41 Fed. Reg. 18,286 (1976)]

[in pertinent part]

Amendments Relating to Late Charges and Due-on-Sale Clauses

Summary. The following summary of the amendments adopted by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the amendments.

I. *Present Situation*. The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts, to assess, impose, and collect late charges respecting delinquent periodic installment payments on such loans, and to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the loan without the consent of the association.

II. *Final Amendment*. A. A Federal association continues to be empowered to include, as a matter of contract between it and the borrower, provisions in its loan contracts for assessment, imposition, and collection of a late charge respecting any delinquent periodic installment payment, and for the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without prior written consent of the association.

B. Limits are placed on the imposition and maximum amount of late charges which may be collected by a Federal association on future loans secured by borrower-occupied homes.

C. Restrictions are placed on exercise of acceleration (due-on-sale) clauses contained in future loan contracts secured by borrower-occupied homes.

III. *Differences from Proposal.* A. Late charges 1. A late charge may be imposed if an installment payment is not received by the association within the grace period; proposal used date-of-payment concept including payment by deposit in the mail.

2. The alternative seven-day delinquency notice requirement in proposal is deleted; associations are required to make disclosure of late-charge provisions in any monthly billings.

3. A new Statement of Policy is issued regarding disclosure and imposition of late charges in connection with existing loans.

B. *Due-on-sale Clauses.* A new Statement of Policy is issued regarding exercise of due-on-sale clauses and loan assumptions.

C. *Effective Date.* Effective date is 7/31/76; proposal specified 5/31/76.

By Resolution No. 76-100 of February 6, 1976, the Federal Home Loan Bank Board proposed to amend §545.6-11 of the Rules and Regulations for the Federal Savings and Loan System (12 CFR 545.6-11) for the purposes of clarifying and limiting the authority of Federal savings and loan associations in the area of late charges and due-on-sale clauses. Notice of such proposed rulemaking was duly published in the FEDERAL REGISTER on February 12, 1976 (41 FR 6283-6287), with an invitation for interested persons to submit comments by March 22, 1976. On the basis of all relevant material presented by interested persons and otherwise available, the Board hereby adopts the changes as proposed, with modifications discussed below.

* * *

Paragraphs (f) and (g) of §545.6-11, relating to Federal associations' authority regarding due-on-sale clauses, are adopted substantially as proposed, with some portions rewritten or re-numbered for clarification purposes only. The effective date of the limitations is July 31, 1976.

A new Statement of Policy clarifying and interpreting the Board's policies pertaining to late charges and due-on-sale clauses is adopted by the Board at §556.9. Paragraph (a) expresses the Board's view that all contract terms affecting the borrower should be fully disclosed no later than the time of loan closing. Paragraph (b)(1) states that the Board disfavors the practice of imposing prepayment charges upon exercise of due-on-sale clauses with regard to loans made prior to August 1, 1976, on the security of borrower-occupied homes, and urges associations to curtail this practice in connection with such earlier loans in the absence of extraordinary circumstances. Paragraph (b)(2) describes considerations relevant to imposition of late charges with regard to loans made prior to August 1, 1976. Paragraph (c) expresses the Board's view that there may be circumstances other than those described in §545.6-1(g)(1) where an association should consider waiver of its acceleration option. Paragraph (d) states the Board's expectation that, in transactions covered by the loan assumption provision of §545.6-11(g)(3), associations should not increase interest rates to rates in excess of current-market interest rates for comparable loans made by the associations applying their normal underwriting standards. New paragraph (e) states the Board's interpretation with respect to maintenance of mortgage insurance in connection with the requirements of paragraph 545.6-11(g)(3).

Finally, it was and is the Board's intent to have late charges and due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, charging of late charges and exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by

§545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different late charges or due-on-sale requirements, nor shall Federal associations attempt to impose a higher late charge than permitted in §545.6-11(e) or avoid the limitations on the exercise of due-on-sale clauses delineated in §545.6-11(g) on the ground that such higher charge or avoidance of limitations is permissible under State law.

Accordingly, the Board hereby revises §545.6-11 and adds §556.9 to read as set forth below, effective June 8, 1976.

1. Section 545.6-11(d) is revised to read as set forth below.

§545.6-11 LOAN CONTRACT

* * *

(f) *Due-on-sale clauses.* A federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

(g) *Limitations on the exercise of due-on-sale clauses.* (1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following:

(i) creation of a lien or other encumbrance subordinate to the association's security instrument;

(ii) creation of a purchase mony security interest for household appliances;

(iii) transfer by devise, descent, or by operation of law upon the death of a joint tenant; or

(iv) grant of any leasehold interest of three years or less not containing an option to purchase.

(2) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no Federal association shall impose a prepayment charge or equivalent fee in connection with the acceleration of the loan pursuant to the exercise of a due-on-sale clause.

(3) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association shall have waived its option to exercise a due-on-sale clause as to a specific transfer if, prior to that transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) reach written agreement that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its security instrument shall be at such rate as the association shall request. Upon such written agreement and resultant waiver, the association shall release such existing borrower from all obligations under the loan instruments, and for purposes of §541.14(a) the association shall

be deemed to have made a new loan to such existing borrower's successor in interest.

2. Section 556.9 is added to read as set forth below:

§556.9 IMPOSITION OF LATE CHARGES AND DUE-ON-SALE CLAUSES.

(a) The Board allows Federal savings and loan associations certain authority to incorporate into loan instruments provisions for imposition of late charges, prepayment charges, and exercise of acceleration clauses, including due-on-sale clauses. The Board expects associations to adopt procedures sufficient to ensure that, no later than the time of loan closing, the rights and obligations of the contracting parties under these provisions are fully and specifically disclosed to borrowers.

(b)(1) Imposition of a prepayment charge upon exercise of a due-on-sale clause is prohibited pursuant to §545.6-11 (g)(2) of this subchapter only with regard to loans made upon borrower-occupied homes after July 31, 1976; however, the Board looks with disfavor upon such practice respecting all loans made on the security of borrower-occupied homes, and believes that associations should abstain therefrom in connection with such loans made before such date, except in extraordinary circumstances.

(2) Although there is no maximum limitation on the amount of late charges which a Federal association may assess or collect, pursuant to contract, on loans made prior to August 1, 1976, on the security of borrower-occupied homes, the Board expects associations to continue to be reasonable and fair in assessing, imposing, and collecting late charges against delinquent borrowers as to such loans, taking into consideration the reason for the delinquency, and the past practice of the borrower respecting delinquencies.

(c) Paragraph 545.6-11(g)(1) of this subchapter prohibits with respect to borrower-occupied-home loans made after July 31, 1976, exercise of due-on-sale clauses to accelerate the loan based on creation of junior liens, certain purchase-money security interests, transfers by devise, descent, or by operation of law upon the death of a joint tenant, and certain short-term leasehold interests. However, the Board believes that there may be other situations respecting loans made on the security of borrower-occupied homes in which, depending on the circumstances of the individual case, it will be appropriate for Federal associations to waive their contractual right to accelerate. These situations include transfers of title to members of the borrower's immediate family, including a former spouse in connection with a divorce, who occupy or will occupy the property (to the extent not covered by paragraph 545.6-11(g)(1)(iii)). In addition, associations should consider waiving any right to require an increase in interest rate pursuant to a due-on-sale clause in cases of extreme hardship to the existing borrower.

(d) Paragraph 545.6-11(g)(3) of this subchapter authorizes Federal associations to increase the interest rate as a condition of loan assumption. However, the Board expects that no association will request an increase in the interest rate to a rate in excess of the then prevailing rate on comparable new loans made by the association applying its normal underwriting standards.

(e) The Board does not interpret paragraph 545.6-11(g)(3) of this subchapter to preclude an association from requiring, as a condition to an assumption, the continued maintenance of mortgage insurance by the existing borrower's successor in interest, whether by endorsement of a policy previously procured by the existing borrower or by entrance into a new contract of insurance.

(Sec. 5, 48 Stat. 132, as amended; 12 U.S.C. §1464. Reorg. Plan No. 3 of 1947, 12 F.R. 4981, 3 CFR, 1943-48 Comp., p. 1071)

By the Federal Home Loan Bank Board.

[SEAL]

J. J. FINN,
Secretary.

12 C.F.R. §545.8-3(f) and (g) (1981)*

"(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

"(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and

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*The Federal Home Loan Bank Board's "due-on-sale" regulation, originally promulgated as 12 C.F.R. §545.6-11(f) and (g), was renumbered as 12 C.F.R. 545.8-3(f) and (g) in 1979. See 44 Fed. Reg. 39,108 (1979) and 44 Fed. Reg. 5[illegible],386 (1979).

(3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest."

28 U.S.C. §1331*

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

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*The version of this statute quoted above was in force in 1977 and 1978, when the *Fox* and *Conference* actions were commenced. It has since been amended in respects not material hereto.

28 U.S.C. §1337*

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

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*The version of this statute quoted above was in force in 1977 and 1978, when the *Fox* and *Conference* actions were commenced. It has since been amended in respects not material hereto.

Opposition

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No. 81-1192

IN THE

Supreme Court of the United States

October Term, 1981

Glendale Federal Savings and Loan Association,
a federally chartered association,
Petitioner,
vs.
David H. Fox, etc., et al.,
Respondents.

Conference of Federal Savings and Loan Associations,
etc., et al.,
Petitioners,
vs.
Alan L. Stein, etc.
Respondent.

**On Writ Of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

RESPONDENTS BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeal correctly find that there was no case or controversy where the Real Estate Commissioner of the State of California rescinded the unauthorized action of a low level employee and agreed to issue a public report under the Subdivided Lands Law of the State of California (Business and Professions Code section 11000 et seq.) in the *Fox* case?

2. Did the Court of Appeal correctly find that the trial court lacked jurisdiction because the Secretary of the Business and Transportation Agency of the State of California had neither commenced nor threatened an action to enforce the rights of individual borrowers in the *Conference II* case?

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No. 81-1192

IN THE

Supreme Court of the United States

October Term, 1981

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION,
a federally chartered association,

Petitioner,

vs.

DAVID H. FOX, etc., et al.,

Respondents.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS,
etc., et al.,

Petitioners,

vs.

ALAN L. STEIN, etc.

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS BRIEF IN OPPOSITION

STATEMENT OF FACTS

A. General Background

In January, 1976, the People of the State of California, by and through the Attorney General and the Secretary of the Business and Transportation Agency of the State of California

("Secretary"), filed an action in the Los Angeles County Superior Court against Glendale Federal Savings and Loan Association ("Glendale"), seeking to require Glendale's compliance with California Civil Code section 711 which section prohibits unreasonable restraints on alienation, and precludes the lender's automatic exercise of a due-on-sale clause contained in a loan instrument based solely upon the fact that the borrower has transferred all or part of his interest in the property which was security for the loan. (*People of the State of California, etc.* v. *Glendale Federal Savings and Loan Ass'n, et al.*, L.A.S.C. No. C 147921 ("*People* v. *Glendale*").)

Glendale immediately removed the state case to federal court, which removal was later held to be improper. Unfortunately, the court did not grant the state's motion to remand until April 11, 1978. In the meantime, Glendale, in order to obtain a *federal* court ruling on the very issue raised in the state case and in order to *preclude* a *state* court determination, in August, 1977, Glendale filed *Glendale Federal Savings and Loan Ass'n.* v. *David H. Fox, etc., et al.* (U.S.D.C., C.D. Cal. *77-3274 WMB*), ("*Fox*") in federal court. During the pendency of the *Fox* case in the Central District Court, another action was also filed in the Eastern District of California by the Conference of Federal Savings and Loan Associations, and certain individual federally-chartered savings and loans associations (all represented by the same counsel that represented Glendale in the *Fox* case and in *People* v. *Glendale*), against the California Secretary of Business and Transportation (*Conference of Federal Savings & Loans Associations, et al.* v. *Silberman,* [*now "Stein"*], *etc.*, U.S.D.C., E.D. Cal., No. S-78-55 PCW ("Conference") in which the plaintiffs likewise sought, in part, to obtain a determination that California real property law equitably restricting use of a due-on-sale clause could not be applied to federally-chartered savings and loan associations. As discussed in detail, *infra,* the *Fox* and *Conference* cases proceeded without an adequate jurisdictional basis and were designed to circumvent the State of California's attempt to judicially resolve these issues in its law enforcement action in state court, *People* v. *Glendale*.

B. The Fox Action

The Secretary disagrees with the Statement of Facts presented to the court by Glendale.

The true facts are that in connection with the processing of a public report application under the California Subdivided Lands Law (Business and Professions Code section 11000 et seq.) a deputy real estate commissioner, without the knowledge of the Real Estate Commissioner, advised a real estate developer that the lending documents of Glendale were not in conformity with California Civil Code section 2924.6. The developer then advised Glendale of the notice that it had received regarding Glendale's lending documents. Glendale thereupon, without first making any inquiry whatsoever of the Department of Real Estate as to the basis of the deputy real estate commissioner's decision, filed suit in federal court.

When the Real Estate Department and the Real Estate Commissioner learned of the action taken by the lone deputy real estate commissioner, the disapproval of Glendale's lending documents was immediately rescinded. Glendale and the developer were also advised that it had not been the policy of the Department of Real Estate nor the Real Estate Commissioner to disapprove of a federal savings and loan association's lending documents on the basis of their non-compliance with California Civil Code section 2924.6.

Thereafter Glendale proceeded to make loans on the real estate project.

Discovery in this case conducted by Glendale showed that out of over 6,000 public report application files maintained by the Department of Real Estate in Los Angeles, San Francisco, and Sacramento this isolated event was the *only* occasion that a developer was notified that a federal association's lending instruments were defective.

The facts also show that both the Real Estate Commissioner and the Secretary filed declarations in this proceeding in which they committed themselves and the Department of Real Estate to abide by the law and not to deny a public report on the grounds that the lending instruments of a federally chartered association failed to conform to California Civil Code section 2924.6 unless and until a court of competent jurisdiction ruled that it would be appropriate to do so.

C. The Conference Action

In the *Conference* case a trade association (of which Glendale is a member) and various named federally chartered savings and loan associations filed a declaratory and injunctive relief action to enjoin enforcement of California's anti-discrimation in lending ("Anti-Redlining")[1] regulations. Additionally, the plaintiffs added a second and wholly unrelated count to the complaint encompassing the same matter that was already pending by virtue of the *Fox* case in the federal district court in Los Angeles and the then pending State court law enforcement action of *People* v. *Glendale.*

As previously noted, the *People* v. *Glendale* case sought to enjoin Glendale's violation of California's real property law prohibition against restraints on alienation of real property in the context of the exercise of a due-on-sale clause. See California Civil Code section 711; *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943 and *Tucker* v. *Lassen Sav. & Loan Ass'n* (1974) 12 Cal.3d 629.

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[1] Redlining is a practice in which a lending institution either refuses or discourages the making of real property loans within a geographical area. With respect to these issues the 9th Circuit ultimately ruled that the procedural (but not substantive) aspects of the state anti-redlining law were preempted. *Conference of Fed. Sav. & Loan Ass'n etc. v. Stein* (9th Cir. 1979) 604 F.2d 1256 aff'd. mem. (1980) 445 U.S. 991 ("*Conference I*"). With respect to the due-on-sale aspect of the case the trial court subsequently ruled that there was preemption. The 9th Circuit reversed on jurisdictional grounds. *Conference of Fed. Sav. & Loan Ass'n etc. v. Stein* (E.D. Cal. 1979) 495 F. Supp. 12, rev'd. No. 79-4818 (9th Cir., Sept. 23, 1981), Pet. for Cert. docketed, No. 81-1192 (U.S. 1981) ("*Conference II*").

REASONS FOR DENYING THE WRIT

Petitioners have sought review by this court of the Ninth Circuit Court of Appeal's decision that no justiciable case or controversy was presented in either the *Fox* action or in the *Conference* action. The Ninth Circuit's ruling, however, is supported by an unbroken line of cases stating that the federal courts will not entertain actions which have become moot and will not entertain actions in which the plaintiff is merely attempting to establish a federal pre-emption defense to a state law claim. Further, even assuming *arguendo* that the Court of Appeals was incorrect on these points, the result reached in the cases is also justified by application of the abstention doctrine. Moreover, as discussed below, other cases which are not burdened by these jurisdictional defects, are pending before this court and raise the substantive issue of whether State laws governing the exercise of "due-on-sale" clauses have been preempted. The petition for writ of certiorari should, therefore, be denied.

I. IN THE FOX ACTION, THE NINTH CIRCUIT CORRECTLY RULED THAT THERE WAS NOT A JUSTICIABLE CASE WHEN THERE WAS UNCONTRADICTED EVIDENCE THAT IT WAS NOT THE POLICY OF THE CALIFORNIA REAL ESTATE COMMISSIONER TO REFUSE TO ISSUE SUBDIVISION REPORTS SOLELY BECAUSE THE LENDING DOCUMENTS CONTAINED DUE-ON-SALE CLAUSES WHICH DID NOT CONFORM TO CALIFORNIA LAW

As Professor Wright has stated:

> "[T]here is no longer an actual controversy, and a declaratory judgment cannot be given, if a matter has become moot. The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the

controversy or the opposing party disclaims the assertion of countervailing rights." (*Wright & Miller, Fed. Practice & Procedure* § 2757, Vol. 10, p. 767 (footnotes omitted).)

In the instant case, except for a long ago rescinded action of a Deputy Real Estate Commissioner who acted in excess of his authority, there has been *no* threat of enforcement of Civil Code section 2924.6 by the State of California. It is *undisputed* that the policy of the Commissioner and the Secretary is to issue public reports under the Subdivided Lands Law even though the terms of the lending documents pertaining to due-on-sale clauses may not be in complete conformity with Civil Code section 2924.6. Indeed, there was no evidence of any other denial of a report on that basis.

In similar circumstances, this court has held that no case or controversy exists. For example, in *Eccles* v. *Peoples Bank of Lakewood Village, California* (1948) 333 U.S. 426, plaintiff sued to invalidate a condition set by the Federal Reserve Board for admitting a state bank to the Federal Reserve System. The court held that the matter was too remote and speculative to justify a declaratory judgment, stating:

> Where administrative intention is expressed but has not yet come to fruition (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 80 L.ed. 688, 698, 56 S.Ct.), or where that intention is unknown (*Great Atlantic & Pacific Tea Company* v. *Grosjean*, 301 U.S. 412, 429-430, 81 L.Ed. 1193, 1203, 57 S.Ct. 772, 112 ALR 293), we have held that the controversy is not yet ripe for equitable intervention. Surely, when a body such as the Federal Reserve Board has not only not asserted a challenged power but has expressly disclaimed its intention to go beyond the legitimate 'public interest' confided to it, a court should stay its hand." (333 U.S. at 434-435.)

In *Golden, as District Attorney of Kings County* v. *Zwickler* (1969) 394 U.S. 103, a unanimous Court ruled that no case or controversy existed because there was no prospect of "immediacy and reality" of the action in question.

In *Bradley* v. *H. J. Cothern* (E.D. Texas 1974) 384 F.Supp. 1216, the Court denied declaratory relief and stated:

> "The plaintiff's request for declaratory relief will be denied because the District is no longer following the policies of which the plaintiff is complaining. The question has now become moot and this Court is not empowered to decide moot questions. *North Carolina* v. *Rice,* 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)." (384 F.Supp. at 1223.)

Similarly, while an actual controversy may have existed when Glendale filed its complaint, *none* existed when the trial court entered its judgment.[2] There was no evidence that the project in question was in any way delayed or inhibited by any act of any of the respondents.[3] Under these circumstances and the applicable case law, it is difficult to understand how Petitioners could claim that a justiciable controversy exists.

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[2] A great deal of evidence was introduced with respect to the case or controversy issue. For example, defendants showed that the Department of Real Estate had modified its forms so that there will not and cannot be a denial of a subdivision report simply because the lending instruments do not comply with Civil Code section 2924.6. Glendale's attorneys reviewed approximately 6,000 Department of Real Estate files and yet were not able to show other denials of a public report on this basis.

[3] Even the trial court made comments regarding the weakness of a case or controversy.

> "THE COURT: Except it's not much of a case. That's not a very judicious statement. I don't mean it. It just isn't very much of a case. Somebody in the State made a mistake, and that mistake may give you the valid basis for jurisdiction. There is certainly good case authority in support of it. But let's assume that People (v. Glendale Federal Savings and Loan Association) goes back (to state court). If People (v. Glendale Federal Savings & Loan Association) stays here, there isn't any problem. I just don't think Fox causes any great problem. . . ." (Reporter's Transcript ("RT") 2, February 14, 1978, p. 79.)

(Footnote continued on following page)

II. NO CASE OR CONTROVERSY EXISTS AS TO THE ISSUE OF WHETHER FEDERAL ASSOCIATIONS ARE BOUND BY STATE LAW WITH REGARD TO THEIR DUE-ON-SALE PRACTICES

Petitioner, Glendale, has asserted that regardless of whether a case or controversy existed with regard to the particular public report in issue in the *Fox* case, that the "central issue" was whether federal law preempts state law with

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"THE COURT: The biggest problem with the Fox case as far as I see it arises out of the hypothetical situation that I've stated, if People (v. Glendale Fed. Sav. & Loan Ass'n) is not here and Fox is, whether that is the type of case that we should proceed with. There are other problems, obviously, that they've raised—" (RT, February 14, 1978, p. 99.)

"THE COURT: You know, I think you fell upon a break. I have said that before, and I will still say it.

"MR. KELLY (Glendale's attorney): Well, your Honor—

"THE COURT: Let me ask you this. Are you willing to take a statement from the State of California now that they will not in the future, until the conclusion of the People (v. Glendale Fed. Sav. & Loan Ass'n) case, deprive you such a—

"MR. KELLY: We want a statement that they will never again tell us that, because of the state law, we cannot use our federally approved instruments. That is what Glendale Federal want.

"THE COURT: Until the law is contrary.

"MR. KELLY: Pardon me?

"THE COURT: Until the law may be determined contrary. If you want that, I wouldn't be surprised if they would give you that.

"MR. KURTZ: (Dep. Atty. Gen.) Yes, your Honor, right now.

"THE COURT: Do you want it?

"MR. KELLY: I think, your honor, we are entitled to judgment.

"THE COURT: Well, then, don't be saying that is all you want, because what you want is a federal determination of that issue.

"MR. KELLY: A Final determination.

"THE COURT: As I said before, you are very iffy in even being here. I have resolved that you have a right to be here, but please don't

(Footnote continued on following page)

regard to due on sale practices. With respect to that issue, however, the question is not one of mootness but rather whether a controversy justiciable in the federal courts existed between the Secretary and Petitioner.

When an action for declaratory relief seeks merely to establish the validity of a federal defense to an actual or

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tell me that you are really interested in the final outcome of this case. You are interested in this decision on the due-on-sale clause. Now, let's—

"MR. KELLY: Well, that's right, your Honor—

"THE COURT: All right. Then, don't say what you want from the state, because they will give it to you right now, right today.

"MR. KELLY: What we want is a final laying to rest of the controversy.

"THE COURT: No. What you want is the controversy to be laid to rest by a federal judge as distinguished from a state judge.

"MR. KELLY: Well, your Honor, that's probably correct too, but the point is that we —" (RT 3, July 28, 1978, pp. 42-43.)

"THE COURT: I have kept this case here by — what do they say, 'by the hair of his chinny chin chin,' something like that in the nursery rhymes. You have a lot of good cases. In this case the State made a mistake, enough of a mistake that I felt we had jurisdiction and I ruled on it, but it really gets a little bit washy when, now on a post-regulation act by (California Commissioner of Real Estate) Fox and his associates, the Board, rather than coming in their majesty — and I say that in all due deference — to protect these savings and loans — And, as you say, that is what you want to do, isn't it?

"You come in on this — what is the word — nonmonumental, anyway, case as a defendant that the savings and loan brought you in on and now say, "Incidentally, while you are taking care of (California Commissioner of Real Estate) Fox and his post-regulation activities, would the Court also, just in passing, resolve all the pre-regulation problems that (California Commission of Real Estate) Fox hasn't been dealing with at all?"

"MR. SIMON (Board's attorney): I wouldn't dispute that our presence perhaps raises the importance of this case.

"THE COURT: No. It doesn't to me because of the way you are here. Your presence — if you are so concerned about the protection of the savings and loans, why aren't you here as a plaintiff exercising that original jurisdiction that you believe you have?" (RT 3, Dec. 19, 1978, pp. 6-7.)

impending state law claim, jurisdiction exists only if the plaintiff could have brought the impending claim in federal court. (*Public Service Commission of Utah* v. *Wycoff Co.* (1952) 344 U.S. 237, 248.) The rule in *Wycoff* applies to the instant case. By bringing the *Fox* action, Glendale was doing nothing more than anticipating respondent's law enforcement actions in state court and seeking a federal court validation of its federal preemption defense. (See *Home Federal Savings & Loan Association* v. *Insurance Department of Iowa* (8th Cir. 1978) 571 F.2d 423 (plaintiff's federal preemption defense to anticipated state insurance law action insufficient to sustain federal question jurisdiction).) Under such circumstances, a case justiciable in the federal courts did not exist.

III. THE ALLEGED "PUBLIC INTEREST" IN THIS MATTER CANNOT SUSTAIN JURISDICTION

Petitioners argue that "public interest" in the issue of whether state or federal law governs the due-on-sale practices of federal associations is an adequate jurisdictional substitute for an actual case or controversy. However, the so-called "public interest" concept does not in and of itself, establish the existence of a case or controversy. As noted by this court in *Richardson* v. *Ramirez* (1924) 418 U.S. 24, 36, "purely practical considerations have never been thought to be controlling by themselves on the issue of mootness . . ." and concern for the public interest cannot confer jurisdiction. (Accord, *Sosna* v. *Iowa* 419 U.S. 401, n.9; *North Carolina* v. *Rice* (1971) 404 U.S. 244; see also *Williams* v. *Alioto* (9th Cir. 1978) 549 F.2d 136, 144-45.)

Neither does the "capable of repetition yet evading review" concept when the chance of repetition is remote and speculative. (*SEC* v. *Medical Committee for Human Rights* (1972) 404 U.S. 403, 406; *Hall* v. *Beals* (1969) 396 U.S. 45, 49.) "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." (*United States* v. *W.T. Grant Co.* (1953) 345 U.S. 629, 633.) This requirement is not satisfied "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (*United States* v. *Concentrated Phosphate Export Ass'n* (1968) 393 U.S. 199, 203.)

In the *Fox* case, it is apparent that the Real Estate Comissioner's actions are not likely to recur. The uncontradicted evidence before the trial court established that the events which gave rise to this case were the result of a single mistake made by a junior level employee. As soon as the policy making officials of the Department reviewed the facts giving rise to this case, the actions were reversed. Further, declarations were submitted to the trial court stating that it is not now, has never been and will not (absent court approval) be the policy of the Real Estate Commissioner to deny public reports on the grounds that a proposed federal association's lending instruments fail to comply with Civil Code section 2924.6. In addition to this the form used by the Department of Real Estate was changed to minimize the possibility of reoccurrence. Under these circumstances, jurisdiction does not exist to hear the *Fox* case.

IV. THE NINTH CIRCUIT CORRECTLY RULED THAT THE TRIAL COURT LACKED JURISDICTION IN THE CONFERENCE II ACTION

The Ninth Circuit held that the Secretary "apparently lacks authority to enforce the "Wellenkamp" restrictions." Petitioners, however, contend that the Secretary is authorized to "enforce Wellenkamp restrictions" and that this creates a case controversy. The analysis presented by petitioners, however, misconstrues the Ninth Circuit's ruling.

While, as a public official, the Secretary may indeed be authorized to bring law enforcement actions to enjoin various unlawful business practices, the obvious thrust of the Ninth

Circuit's ruling was that the Secretary lacked the authority to bring an action *on behalf of particular individuals.* This contrasts sharply with the Secretary's statutory authority under California's "anti-redlining" law to take administrative action to compel the offending lending institution to grant relief to particular individuals. (See Calif. Health & Saf. Code § 35800, et seq. and Cal. Admin. Code, Tit. 21, § 7100 et seq.; *Conference I,* supra.)[4]

Unlike *Conference I,* this case does not involve a particular situation where the Secretary was authorized to enforce the law on behalf of particular individuals. In *Conference I,* the Secretary was authorized to enforce the California Anti-Redlining Act, and thus the court held that there was a justiciable case or controversy. The Secretary in the instant case (*Conference II*) did not threaten or take any administrative or other action against any of the plaintiffs pertaining to the issues raised therein. The *People* v. *Glendale* action was not an action brought on behalf of an individual or a class of individuals. Rather, it is in the nature of a law enforcement action. (See *People* v. *Pacific Land Research* (1977) 20 Cal.3d 10, 17.) Further, in the *People* v. *Glendale* action, the State only sought a declaration that Glendale was required to conform to the rulings issued by the California Supreme Court in *Wellenkamp* v. *Bank of America, supra* (1978) 21 Cal.3d 943. Accordingly, under *Public Serv. Comm'n* v. *Wycoff Co., supra,* and *Skelly Oil Co.* v. *Phillips Co., supra,* the trial court lacked jurisdiction over the *Conference II* case.

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[4] Any assertion of pendant jurisdiction must also fail because due-on-sale issues cannot possibly be said to "derive from a common nucleus of operative facts" relating to the anti-redlining issues. *United Mineworkers of America* v. *Gibbs* (1966) 383 U.S. 715, 725.

V. REGARDLESS OF WHETHER THE NINTH CIRCUIT WAS CORRECT IN HOLDING THAT JUSTICIABLE CONTROVERSIES DO NOT EXIST, THE RESULT WAS CORRECT; MOORE v. SIMS MANDATES ABSTENTION

Assuming arguendo that the Ninth Circuit erred in holding that a case or controversy does not exist, this court should still deny the petition for writ of certiorari. Both the *Fox* action and the *Conference II* action purported to deal with the issue of whether state laws which equitably restricted the use of due-on-sale clauses had been preempted by federal regulations. This *very* issue, however, was at the time the court ruled in this case already pending in the *People* v. *Glendale* case (as well as in other state court actions). The *Fox* and *Conference II* cases were intended to and did interfere with an existing state action which involved the same issue.[5]

The Court Was Required to Abstain

In *Moore* v. *Sims* (1979) 442 U.S. 415, this Court carefully analyzed those circumstances in which a federal court should abstain from ruling, holding that where there is a pending state proceeding in which important state policies are at issue, abstention is required.

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[5] On July 5, 1979, the *People* v. *Glendale* case went to trial. There the court held that with respect to loans made prior to the effective date of the Board's specific due-on-sale regulation (June (1976), accelerations were (and are) governed by state law. With respect to post-regulation loans, the court held that the state was collaterally estopped to proceed. This latter ruling was based upon the fact that the federal trial court in the *Fox* case had already issued its judgment. Such a result is consistent with the general rule that federal judgments are final unless and until reversed on appeal. (*Stoll* v. *Gottlieb* (1938) 305 U.S. 165, 170.) State court judgments, on the other hand, are not final until all rights to appeal have been exhausted. (*Martin* v. *Martin* (1970) 2 Cal.3d 752.) Ultimately the California Court of Appeal reversed the ruling on preemption and also held that the "public interest" exception would preclude application of collateral estoppel. The Court of Appeal then concluded that there was preemption with respect to post regulation loans as well. The California Supreme Court denied the People's petition for hearing on October 28, 1981 and ordered that the case be unpublished. An unpublished case may not be cited as authority. (Calif. Rules of Court, rule 976.) On January 26, 1982 the People filed a Petition for Writ of Certiorari for review of the *People v. Glendale* decision.

> "Appellants argue that the Federal District Court should have abstained in this case under the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971). The *Younger* doctrine, which counsels federal court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. (*Samuels* v. *Mackell,* 401 U.S. 66, 69 (1971).) That policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman* v. *Pursue, Ltd.* 420 U.S. 592 (1975), the basic concern — that threat of our federal system posed by displacement of state courts by those of the National Government — is also *fully applicable to civil proceedings* in which important state interests are involved. As was the case in *Huffman,* the State here was a party to the state proceedings, and the temporary removal of a child in a child abuse context is, like the public nuisance statute involved in *Huffman,* 'in aid of and closely related to criminal statutes.' (*Id.,* at 604.) The existence of these conditions, or the presence of such other vital concerns as enforcement of contempt proceedings, *Juidice* v. *Vail,* 430 U.S. 327 (1927), or the vindication of 'important state policies such as safeguarding the fiscal integrity of [public assistance] programs,' *Trainor* v. *Hernandez,* 431 U.S. 434, 444 (1977), determines the applicability of *Younger-Huffman* principles as a bar to the institution of a later federal action." Moore at 423. (emphasis added.)

The present cases fall squarely within the guiding principles set forth in *Moore.* Here, there was an action pending in a state court which was brought by the chief law enforcement officer of the State of California to prevent violations of state laws governing transfers of real property. The *People* v. *Glendale* case, while civil in nature, is classified as a law enforcement action and has the same goal as criminal prosecutions — to deter violations of state law. (See *People* v.

Pacific Land Research (1977) 20 Cal.3d 10, 17.) Moreover, the People v. Glendale case involves undeniably "important state interests." (*Moore, supra,* 442 U.S. at 423.) Indeed petitioners contend that millions of dollars are involved, title to real property will be seriously affected, and the fiscal integrity of both savings and loan associations and the Federal Savings and Loan Insurance Corporation will be affected should they be subject to state law. In short, the very sorts of important state interests which were considered in *Huffman* v. *Pursue, Ltd.* (1975) 420 U.S. 592, *Juidice* v. *Vail* (1977) 430 U.S. 327, *Trainor* v. *Hernandez* (1977) 431 U.S. 434, 444, and *Moore* v. *Sims, supra,* are also present here.

Thus, this case falls squarely within the holdings of *Moore* and requires application of the abstention doctrine.

VI. THE SUBSTANTIVE ISSUES RAISED BY THE FOX AND CONFERENCE II ACTIONS HAVE BEEN CORRECTLY DECIDED IN RELATED CASES NOW PENDING BEFORE THIS COURT

As previously noted, Petitioners have urged this court to consider the *Fox* and *Conference II* cases because the underlying issue of whether federal associations are bound by state laws equitably restricting the enforcement of due on sale clauses is significant. These issues, however, have been correctly ruled upon by the California Supreme Court in *Panko* v. *Pan American Savings and Loan Association,* 119 Cal.App.3d 916, 174 Cal. Rptr. 240, *appeal docketed,* No. 81-922 (U.S. 1981) and *de la Cuesta* v. *Fidelity Federal Savings and Loan Association,* 121 Cal.App.3d 328, 175 Cal. Rptr. 467, *appeal docketed,* No. 81-750 (U.S. 1981).

If this court thinks it appropriate to review the due on sale issues, it should do so in a case where jurisdiction is clear, not contrived.[6]

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[6] The Secretary has submitted amicus curiae briefs to this court in both *Panko* and *de la Cuesta* urging that the court dismiss the appeals or, in the alternative, summarily affirm.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED: January 28, 1982.

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No. 81-1192

In the Supreme Court of the United States

OCTOBER TERM, 1981

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION,
ET AL., PETITIONERS

v.

DAVID H. FOX, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL HOME LOAN BANK BOARD

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Panko v. *Pan American Savings & Loan Association,* 119 Cal. App. 3d 916, 174 Cal. Rptr. 240, appeal pending, No. 81-922 2

Tan v. *California Federal Savings & Loan Association,* No. 23471 (4th Dist. July 2, 1981), appeal pending, No. 81-933 2

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MEMORANDUM FOR THE FEDERAL HOME LOAN BANK BOARD

---

1. The Federal Home Loan Bank Board is an independent federal regulatory agency that is responsible for administering the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. III) 1461 *et seq.* As such, the Board regulates under a broad grant of authority many activities of federal savings and loan associations. See 12 U.S.C. (& Supp. III) 1464(a). One of the Board's regulations authorizes federal associations to include and enforce "due on sale clauses" in conventional mortgages. 12 C.F.R. 545.8-3(f). These clauses allow an association to declare the balance of a loan due if the real property securing the loan is sold or transferred by the borrower.

The Supreme Court of California has declared due-on-sale clauses in mortgages generally to be a restraint on alienation in violation of Cal. Civ. Code §711 (West 1954), and therefore not enforceable. *Wellenkamp* v. *Bank of America*, 21 Cal.3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). California Courts of Appeal have applied the *Wellenkamp* rule to mortgages issued by federal savings and loan associations, even though the Board's regulation clearly permits due-on-sale clauses in such mortgages. See *de la Cuesta* v. *Fidelity Federal Savings & Loan Association*, 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (4th Dist. 1981), appeal pending, No. 81-750 (probable jurisdiction noted Jan. 25, 1982); *Panko* v. *Pan American Savings & Loan Association*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1st Dist. 1981), appeal pending, No. 81-922 (jurisdictional statement filed Nov. 13, 1981); *Hehir* v. *Glendale Federal Savings & Loan Association*, No. 23309 (4th Dist. July 2, 1981), appeal pending, No. 81-992 (jurisdictional statement filed Nov. 23, 1981); *Gross* v. *Glendale Federal Savings & Loan Association*, No. 21903 (4th Dist. July 23, 1981), appeal pending, No. 81-1139 (jurisdictional statement filed Dec. 14, 1981); *Tan* v. *California Federal Savings & Loan Association*, No. 23471 (4th Dist. July 2, 1981), appeal pending, No. 81-993 (jurisdictional statement filed Nov. 23, 1981).

2. In order to sell units in a real estate development project located in California, the developer must obtain a "public report" from the California Real Estate Commission. Cal. Bus. & Prof. Code § 11000 *et seq.* (West Cum. Supp. 1981). Relying on the rule in *Wellenkamp*, the Department of Real Estate initially refused to issue such a report to a developer who had arranged to finance a project through petitioner Glendale Federal Savings & Loan Association. The Department reached that result because the mortgages involved contained a due-on-sale clause (Pet. App. 9).

In response, petitioner Glendale Federal filed suit in August 1977 in the United States District Court for the

Central District of California, seeking a declaration that the refusal of the California authorities to issue the report because of a due-on-sale clause violated the Home Owners' Loan Act, as applied through the Board's regulation, which expressly allows such clauses to be included in the association's mortgages. The Board was named as a defendant in that action, but it admitted all of petitioner's allegations and filed a cross claim against respondents seeking a declaration that its regulations preempted state law with regard to the enforceability of due-on-sale clauses by federal savings and loan associations (Pet. App. 29). The district court rejected all arguments raised by respondents aimed at its power to decide this controversy and entered judgment in favor of petitioner and the Board (Pet. App. 24-56).

In February 1978, petitioner Conference of Federal Savings and Loan Associations filed suit against the Secretary of the Business and Transportation Agency of the State of California and the Federal Home Loan Bank Board in the United States District Court for the Eastern District of California (Pet. App. 57-67). That suit alleged that the Secretary was attempting through court actions and otherwise to enforce the *Wellenkamp* rule against federal savings and loan associations. The complaint requested a declaration that federal law preempted state law and appropriate injunctive relief. The Board again admitted all of the allegations of the complaint and filed a cross claim against the Secretary seeking declaratory relief (*id.* at 58). The district court held that the case had been properly brought in federal court and that the Board's regulations preempted inconsistent state law (*id.* at 63-67). The court therefore entered a final judgment in favor of petitioner and the Board (*id.* at 67).

3. On appeal, the two district court decisions were consolidated and the Board participated as an appellee. The Ninth Circuit reversed (Pet. App. 1-4). It found that the

California authorities named as defendants in the *Glendale* suit had issued the report requested and had represented to the court that they had no authority to deny the report on the basis of the terms of the mortgage. Thus, their "express policy" was "to issue reports * * * even when the lending documents contain due-on-sale clauses" (Pet. App. 2). In view of this factual finding, the court of appeals concluded that the case was moot.

With regard to the suit between the Conference and the Secretary of the Business and Transportation Agency of California, the court held that there was no justiciable controversy because the defendant Secretary "lacks the authority to enforce the *Wellenkamp* restrictions. Moreover, he has neither threatened nor commenced any action against the plaintiffs" (Pet. App. 3).

4. In its brief filed with the Ninth Circuit in this case, the Board asserted that both controversies were justiciable and, for the reasons generally presented in the petition (Pet. 18-24), it continues to be of that view. Nonetheless, the Board did not petition for a writ of certiorari in this case because the court of appeals' ruling based on mootness and justiciability did not appear to be of sufficient general importance to warrant review by this Court. Moreover, our primary concern is with the underlying preemption issue, which was not reached by the court of appeals in this case, but which is now pending before this Court in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (probable jurisdiction noted Jan. 25, 1982). For these reasons, we do not believe that review by this Court of the decision below is essential.[1]

---

[1] If the Court were to grant the petition in this case, the Board would urge reversal of the Ninth Circuit's decision as to justiciability and would also request this Court to hold the case pending a decision in *de la Cuesta* as to whether state law is preempted by the Board's regulation governing due-on-sale clauses in instruments issued by federal savings and loan associations.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1192

IN THE

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Respondents.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, etc., *et al.*,

Petitioners,

vs.

ALAN L. STEIN, etc., *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

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ALAN L. STEIN, etc., *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

I.
PRELIMINARY STATEMENT.

Respondents contend that certiorari should be refused because 1) in light of the noting of probable jurisdiction in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, No. 81-750, there is no practical necessity for this Court to grant it; and 2) in any event, the refusal of the Ninth Circuit to decide the substantive issues presented was correct.[1]

In fact, and as the Petitioners shall hereinafter demonstrate, 1) since the within proceeding concerns an aspect of the preemption "due-on-sale" controversy not involved in *de la Cuesta*, there *is* a practical necessity, notwithstanding the noting of probable jurisdiction in *de la Cuesta*, for this Court to grant certiorari in the within proceeding; and 2) the refusal of the Ninth Circuit to decide the substantive issues presented was manifestly *not* correct.

II.
ARGUMENT.

A. The Noting of Probable Jurisdiction in de la Cuesta Does Not Obviate the Granting of Certiorari in the Within Proceeding.

Both the within proceeding and *de la Cuesta* present the question of whether state laws such as California Civil Code §711 restricting the exercise of "due-on-sale" clauses apply to the mortgage loan contracts of federal associations.

In addition, however, *the within proceeding also presents the question of whether, even assuming arguendo that state laws restricting the exercise of "due-on-sale" clauses do not apply to federal associations, a state may nevertheless indirectly prevent or inhibit federal associations from exercising their "due-on-sale" rights.*

---

[1] All terms used herein have the same meaning as that accorded to them in the Petition for Writ of Certiorari ("the Petition") dated December 21, 1981.

In particular, the genesis of the *Fox* action was not the exercise or attempted exercise of a "due-on-sale" clause by a federal association or even an attempt by the State of California to secure a judicial declaration that state law applies to the "due-on-sale" practices of federal associations. Rather, the genesis of the action was the refusal of the Department of Real Estate to satisfy a condition precedent to the sale of property in a real estate development, the issuance in accordance with California Business and Professions Code §11000 *et seq.* of a "public report", because the mortgage loan contract that was to be used to finance the purchase of properties in the development did not conform to a California statute, Civil Code §2924.6, restricting the exercise of "due-on-sale" clauses. (See the Petition, p. 7.) Petitioners believe that if federal law preempts state law with respect to the "due-on-sale" practices of federal associations, the refusal of a state to issue a "public report" under the circumstances described would be unlawful. Nonetheless, it is obviously possible, at least as a theoretical matter, that even if federal law does preempt, a state would nonetheless be entitled to deny public reports based upon the use by federal associations of mortgage loan contracts that are not in conformity with California law.

In point of fact, Respondents take the position that there would be such an entitlement.

In a motion for reconsideration of an order granting partial summary judgment in *Fox* to the effect that federal law preempts state law restriction on the exercise of "due-on-sale" clauses, *Respondents expressly state that notwithstanding the existence of such preemption, they could nevertheless 1) deny "public reports" based upon the failure of the mortgage loan contracts of a federal association to comply with provisions of California law such as Civil Code §2924.6; and 2) deny federal associations the right to foreclose pursuant to state law following the exercise of a "due-on-sale" clause.*

> "The Court [the United States District Court for the Central District of California] has ruled that the Federal Home Loan Bank Board can by regulation preempt state law restrictions on the use of the due-on-sale clause.
>
> "In this case, however, the Real Estate Commissioner had the power to refuse to permit the filing of public reports under the Subdivided Land Law (Cal. Bus. & Prof. Code §11000, *et seq.*) unless the lending documents complied with California law. *Regardless of whether federally chartered savings and loan associations can or cannot use due-on-sale clauses, why can't the California Legislature require that if [public] reports are to be filed, they must comply with California law?* How can this court hold that an institution that does not comply with the law has a right to privilege bestowed by that law? (Especially when that institution's documents are to be governed by state law. See *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975).
>
> "In addition, Civil Code Section 2924 provides certain rights for nonjudicial foreclosure. No one has a right to exercise such foreclosures unless it is in compliance with all of the provisions of law, including restrictions on due-on-sale clauses. In other words, *even if the state cannot preclude the use of due-on-sale clauses, the state can condition certain rights and remedies on compliance with state law.*" ("Motion for Reconsideration" filed November 15, 1978, p. 3; emphasis added.)[2]

---

[2] A copy of the "Motion for Reconsideration" is attached hereto at Appendix, pp. 1-4.

There have been other efforts by various states, or branches of state government, to thwart the application of federal law to the "due-on-sale" practices of federal associations — efforts that could well continue regardless of how the *de la Cuesta* issues are resolved.

Several Florida courts, for example, have taken the position that, whether or not federal law preempts state law, state "equitable prin-

(footnote continued on following page)

In short, the within action presents a question not embraced in *de la Cuesta* that could be of enormous pragmatic significance in enabling federal associations to exercise "due-on-sale" clauses and, therefore, in vindicating the ability of the Bank Board to regulate the "due-on-sale" practices of federal associations. Accordingly, the granting of certiorari in the within proceeding, far from being unnecessary, is essential to preserving the efficacy and integrity of this Court's resolution of the *de la Cuesta* issue.

B. Any Claim That the Ninth Circuit Was Correct in Refusing to Decide the Substantive Issues Presented Is Belied by the Record.

1. Jurisdiction Over Fox.

a. *Glendale Federal's Claim That the Department of Real Estate Improperly Denied a "Public Report" Because Glendale Federal's Mortgage Loan Contracts Did Not Comply With Civil Code §2924.6 Is Manifestly Not Moot.*

As noted in §II.A., *supra*, the controversy out of which *Fox* arose was the refusal of the Department of Real Estate

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ciples" may properly be invoked to prevent federal associations from utilizing state judicial proceedings to foreclose their mortgage loan contracts following exercise of "due-on-sale" clauses. See, *e.g.*, *First Federal Savings & Loan Association v. Lockwood*, 385 So.2d 156, 159-160 (1980), in which the court observed:

> "The true issue before us is not whether a due-on-sale clause may be authorized or even required in a federal association mortgage instrument, but whether the due-on-sale clause must be automatically enforced by a state court without regard to traditional principles of equity. In other words, where a federal savings and loan mortgage instrument includes an acceleration clause exercisable at the option of the lender, and the lender elects to activate the clause and, subsequently, to place the matter before a state court in an effort to obtain equitable relief in foreclosure, must the state court grant the desired relief without recourse to traditional equitable considerations? We answer the question by stating that plaintiff who initiates a suit in equity must be subject to all of the applicable consequences of that action and not merely those to which he chooses to submit." (385 So.2d 160).

Similarly, the State of Iowa has enacted a statute restricting the right of a lender, including a federal savings and loan association, to foreclose a mortgage loan contract following exercise of a "due-on-sale" clause. See Iowa Code §535.8(a)(c).

to issue a "public report" in connection with a real estate development project because the mortgage loan contracts of the proposed take out lender, Glendale Federal Savings and Loan Association ("Glendale Federal"), failed to comply with a California statute limiting the exercise of "due-on-sale" clauses, California Civil Code §2924.6.

Respondents argue that the controversy was moot when the District Court rendered judgment because the refusal was merely the result of a mistake by "a Deputy Real Estate Commissioner who acted in excess of his authority", that "there was no evidence of any other denial of a report' based upon the failure of the mortgage loan contracts of a federal association to comply with §2924.6; and that when the mistake came to the attention of responsible officials, it was corrected and the report issued. ("Respondents Brief In Opposition", pp. 5-7.)

Respondents' argument is predicated upon a factual recital that is both incomplete and erroneous. It is incomplete because it fails to disclose the implicit threat on the part of the Department of Real Estate to resume denying public reports based upon noncompliance with §2924.6 once a judicial decision was obtained permitting it to do so. (See the Petition, pp. 18-19.) It is erroneous because Respondents' representation to the contrary notwithstanding, the refusal of the public report was not merely a single isolated incident but, rather, the result of an ongoing course of conduct that resulted in at least *three* public reports being denied by the Department of Real Estate based upon the failure of the mortgage loan contracts of federal associations to comply with §2924.6.[3]

---

[3] See the "Affidavit of Peter H. Pickslay" and the "Affidavit of Mel Wynn", filed in the District Court in the *Fox* action and copies of which (with Exhibits omitted) are set forth at Appendix, pp. 5-8.

b. *Respondents' Argument That There Is No Justiciable Controversy Between Glendale Federal and Respondents Concerning Whether Federal Associations Are Bound by State Law With Regard to Their Due-On-Sale Practices Is Without Merit.*

Respondents argue that "[w]hen an action for declaratory relief seeks merely to establish the validity of a federal defense to an actual or impending state law claim, jurisdiction exists only if the plaintiffs could have brought the impending claim in federal court"; and that "[b]y bringing the *Fox* action, Glendale was doing nothing more than anticipating Respondents' law enforcement action in state court and seeking a federal court validation of its federal preemption defense". ("Respondents' Brief In Opposition", pp. 9-10.)

Respondents are wrong.

Glendale Federal does not dispute that a claim does not arise under federal law when it *merely* seeks to establish a federal defense to a state court action — whether anticipated or extant — that does not itself arise under federal law. *When, however, a claim seeks to vindicate a right conferred by federal law in order to resolve a controversy that has vitality independent of the state court action, the claim does arise under federal law regardless of the nature of the state court action.* Directly on point are the recent decisions of this Court in *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980) ("*Conference I*") and *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing*, 430 U.S. 519 (1977).

Moreover, a federal district court has "pendent" jurisdiction to adjudicate claims that do not arise under federal law but that are related to claims over which the court has "federal question" jurisdiction; and such "pendent jurisdiction" survives even if the controversy that originally gave rise to "federal question" jurisdiction is subsequently rendered moot. See *Rosado v. Wyman*, 397 U.S. 397 (1970); *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979).[4]

The *Fox* action embraced 1) a claim that the Department of Real Estate could not lawfully refuse to issue "public reports" based upon the noncompliance of Glendale Federal's mortgage loan contracts with §2924.6; and 2) a more general claim that the "due-on-sale" practices of federal associations, including Glendale Federal, are not subject to state law. That the former claim sought to vindicate a right conferred by federal law in order to resolve a controversy that had vitality independent of any pending or threatened state court action, and that therefore arose under federal law, is obvious. Since the latter claim is clearly related to the former, the District Court had, at the minimum, "pendent" jurisdiction over it; and that jurisdiction would have survived even assuming, *arguendo*, that the former claim became moot.[5]

c. *Respondents Fail to Refute Glendale Federal's Argument That Even if the Claims Presented by the Fox Action Are Moot, as Between the Parties, the District Court Was Still Entitled to Decide the Action if It Was in the Public Interest to Do So.*

Respondents assail Glendale Federal's contention that even if the claims presented by the *Fox* action are moot as between the parties, the District Court was still entitled to decide the action if it was in the public interest to do so.

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[4] While the pendent claim may be dismissed, whether or not it should be dismissed is addressed to the sound discretion of the District Court. See *Rosado v. Wyman*, *supra*, 397 U.S. 402-405.

[5] Actually Glendale Federal believes that there was "federal question" jurisdiction over the latter claim as well; but given the presence of "pendent" jurisdiction, it is unnecessary for this Court to reach the question of whether "federal question" jurisdiction itself was present.

While their position in this regard is murky, what they appear to be arguing, in essence, is that mootness compels the dismissal of a claim even though the "public interest" may demand that the claim be adjudicated. (See "Respondents Brief in Opposition", pp. 10-11.)

Suffice it to say that Respondents are simply wrong in their view of the law: Federal district courts may, and do, adjudicate moot claims because it is in the "public interest" to do so. (See the Petition, pp. 20-21.)

2. Jurisdiction Over the Conference II Action.

As the Petitioners have heretofore demonstrated, the Ninth Circuit, in holding that *Conference II* failed to present a justiciable controversy, distinguished *Conference I* on the theory that whereas in *Conference I* "the Secretary had attempted actively to enforce state antidiscrimination procedures . . . the Secretary apparently lacks the authority to enforce the *Wellenkamp* restrictions. . . ." In fact, of course, in the *People* action, the Secretary *did* assert the type of authority that the Ninth Circuit opined that he lacked. (See the Petition, pp. 22-23.)

What is the Respondents' answer to the foregoing?

Respondents argue that whereas in *Conference I* the Secretary was authorized to enforce the California "fair lending" laws on behalf of specific individuals, the Ninth Circuit determined with respect to *Conference II* that "the Secretary lacked the authority to bring any action [with respect to *Wellenkamp*] *on behalf of particular individuals*"; that the *People* action "was not an action brought on behalf of an individual or a class of individuals . . . [but was] in the nature of a law enforcement action"; and, therefore, that whereas *Conference I* involved a justiciable controversy, *Conference II* did not.

The argument is false and, indeed, frivolous.

It is predicated upon a misrepresentation of the Ninth Circuit's ruling in *Conference II*. If the Ninth Circuit had intended to distinguish *Conference I* and *Conference II* on the ground that in the former case the Secretary was empowered to sue on behalf of specific individuals whereas in the latter case he was not, the Ninth Circuit would, of course, have to have believed that the justiciable controversy adjudicated in *Conference I* concerned efforts by the Secretary to enforce the California "fair lending" laws on behalf of specific individuals. In fact, however, the Ninth Circuit in *Conference I* expressly limited its decision to the question of whether the Secretary could compel compliance by federal associations with the *procedural aspects* of the "fair lending" law; and the Ninth Circuit in *Conference II* expressly acknowledged that fact by stating that in *Conference I* "the Secretary had attempted actively to enforce state antidiscrimination *procedures*". (Appendix to the Petition, p. 3; emphasis added.)

In short, the Ninth Circuit was mistaken in *Conference II* in its characterization of the Secretary's authority; and nothing that Respondents say can obscure that simple and ineluctable fact.[6]

C. The Inappropriateness of Abstention as to Either Fox or Conference.

Respondents contend that the District Courts in the *Fox* and *Conference* actions should have abstained from adjudicating the actions by reason of the pendency of the *People* action.

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[6] When a federal district court acquires "federal question" jurisdiction over a claim, it also acquires "pendent" jurisdiction over related claims as to which there would not be independent "federal question" jurisdiction. (See §II. B. 1. b., *supra*.) Here the "fair lending" claim of Petitioner adjudicated in *Conference I* was combined with the "due-on-sale" claim of Petitioners adjudicated in *Conference II* into a single action. Both claims derived from a common nucleus of operative facts — the persistent and long-standing efforts of the State of California to regulate the mortgage lending practices of federal associations. Hence even assuming *arguendo* that the District Court did not acquire "federal question" jurisdiction over the "due-on-sale" claim, since it acquired "federal question" jurisdiction over the "fair lending" claim it would have acquired "pendent" jurisdiction over the "due-on-sale" claim.

The short answer to Respondents' abstention argument is that the presence of the Bank Board as a cross-claimant in the *Fox* and *Conference* actions made abstention by the District Courts below entirely inappropriate. See *First Federal Savings & Loan Association of Boston v. Greenwald*, 591 F.2d 417, 421-423 (1st Cir. 1979).

Moreover, even without considering the presence of the Bank Board as a cross-complainant in both the *Fox* and *Conference* actions, under this Court's reasoning in *Moore v. Sims*, 442 U.S. 415 (1979), abstention by the District Courts would have been inappropriate.

The *Fox* and *Conference* actions were concerned with questions of federal law; the conflict between a state law on the one hand, and HOLA and the resolutions of the Bank Board on the other, was and is manifestly concrete; and no opportunity existed for a "narrowing construction" by a state court "that might obviate" the need to decide questions of federal law.

III.
CONCLUSION.

Nothing that Respondents have said avoids the conclusion that certiorari should be granted.

Respectfully submitted,

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Appendix

I

APPENDIX.

Motion for Reconsideration.
[Filed November 15, 1978].

United States District Court, Central District of California.

Glendale Federal Savings and Loan Association, a federally chartered association, Plaintiff, v. David H. Fox, etc., et al., Defendants.

Federal Home Loan Bank Board, Cross-Claimant, v. Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Cross-Claim Defendant. No. 77-3274 WMB.

TO PLAINTIFF AND THE FEDERAL HOME LOAN BANK BOARD AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 12, 1978, at 4:00 o'clock P.M. or as soon thereafter as the matter can be heard, in the courtroom of the Honorable William Matthew Byrne, Jr., Judge Presiding, located at 312 North Spring Street, Los Angeles, California, defendants will move the court to reconsider its decision granting partial summary judgment on the grounds set forth in the attached points and authorities submitted herewith and upon all the records, files and evidence in this case.

DATED: November 15, 1978.

EVELLE J. YOUNGER, Attorney General
ARTHUR C. de GOEDE,
Assistant Attorney General
JOSEPH M. O'HERON,
W. GARY KURTZ,
Deputy Attorneys General

By /s/ Joseph M. O'Heron
Attorneys for State Defendants

POINTS AND AUTHORITIES

The court has ruled that the Federal Home Loan Bank Board can by regulation preempt state law restrictions on the use of the due-on-sale clause.

In this case, however, the Real Estate Commissioner had the power to refuse to permit the filing of public reports under the Subdivided Land Law (Cal. Bus. & Prof. Code §11000, *et seq.*) unless the lending documents complied with California law. Regardless of whether federally chartered savings and loan associations can or cannot use due-on-sale clauses, why can't the California Legislature require that if reports are to be filed, they must comply with California law? How can this court hold that an institution that does not comply with the law has a right to a privilege bestowed by that law? (Especially when that institution's documents are to be governed by state law. See *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975).)

In addition, Civil Code Section 2924 provides certain rights for nonjudicial foreclosure. No one has a right to exercise such foreclosures unless it is in compliance with all of the provisions of law, including restrictions on due-on-sale clauses. In other words, even if the state cannot preclude the use of due-on-sale clauses, the state can condition certain rights and remedies on compliance with state law.

The opinion of the court only deals with the issue of preemption. It does not deal with whether (a) the state can condition the use of state procedures upon compliance with state law; (b) a federally chartered institution has a right to use state procedures and have its documents enforced under state law without fully complying with state law and (c) the Real Estate Commissioner must file the report even if it does not comply with state law.

These questions were not discussed in the *Meyers* case. We urge the court to apply its ruling to the specific facts of this case. If the court does not apply its holding to the specific facts of this case, what then are the limits of preemption? What other permits and rights are federally chartered savings and loans entitled to without full compliance with the law?

These very difficult questions demonstrate the confusion that may result from the summary judgment as well as the court's opinion. We recognize that the issues have been briefed and considered by the court. Since the opinion does not deal with the issues raised in this motion for reconsideration, we hope the court will not think us presumptious for suggesting that further consideration of these issues is warranted.

Respectfully submitted,
EVELLE J. YOUNGER,
Attorney General
ARTHUR C. de GOEDE,
Assistant Attorney General
JOSEPH M. O'HERON,
W. GARY KURTZ,
Deputy Attorneys General
By /s/ Joseph M. O'Heron
Attorneys for State Defendants

Affidavit of Peter H. Pickslay.
[Filed September 28, 1977].

United States District Court, Central District of California.

Glendale Federal Savings and Loan Association, a federally chartered association, Plaintiff, vs. David H. Fox, etc., et al., Defendants. No. CV 77 3274-WMB.

State of California, County of San Diego — ss.

I, PETER H. PICKSLAY, being first duly sworn, declare and say as follows:

1. I am an attorney at law duly admitted to practice in the State of California, and am a resident of San Diego County, State of California. For the past two years I have been employed by Home Federal Savings and Loan Association of San Diego as counsel in its Legal Department.

2. In July, 1976, I received a telephone call from Joan Jankowski, Subdivision Officer for First American Title Insurance Company ("First American") in San Diego, with regard to a then proposed tract subdivision in San Diego County known as El Camino Estates Unit No. 3 ("the proposed tract subdivision"). Ms. Jankowski advised me that First American had received written notification from the California Department of Real Estate of deficiencies in the documentation submitted to it in connection with the proposed tract subdivision. Specifically, Ms. Jankowski advised me that Watkin P. Watkins, Deputy Real Estate Commissioner of the State of California, had notified First American that the note and deed of trust forms of Home Federal Savings and Loan Association of San Diego did not comply with California Civil Code Section 2924.6 and that forms in compliance with said section would have to be submitted.

3. Subsequent to my telephone conversation with Ms. Jankowski, I received from her a copy of the Department of Real Estate's written notification that the note and deed of trust forms of Home Federal Savings and Loan Association of San Diego were not in compliance with Section 2924.6 of the Civil Code. A true copy of said written notification is attached hereto as Exhibit "A".

/s/ Peter H. Pickslay
PETER H. PICKSLAY

Subscribed and sworn to
before me this 27th day
of September, 1977.

/s/ Emerita Lafon
Notary Public in and for
said County and State

Affidavit of Mel Wynn.
[Filed September 28, 1981].

United States District Court, Central District of California.

Glendale Federal Savings and Loan Association, a federally chartered association, Plaintiff, vs. David H. Fox, etc., et al., Defendants. No. CV 77-3274-WMB.

State of California, County of Los Angeles — ss.

I, MEL WYNN, being first duly sworn, declare and say as follows:

1. I am, and have been continuously since 1972, Vice President of Wilshire Diversified, Inc. ("Wilshire Diversified"). Wilshire Diversified is a real estate development corporation and is licensed as a general contractor by the State of California. Wilshire Diversified is, and has been, continually engaged in real estate development and construction in the Southern California area.

2. As Vice President of Wilshire Diversified, my duties include the obtaining of Final Subdivision Public Reports which are issued by the California Department of Real Estate ("DRE") and must be obtained before Wilshire Diversified may sell or lease any units in a newly built planned development, condominium or community apartment project.

3. During the summer of 1976, Wilshire Diversified was engaged in developing a tract subdivision (Tract 2174-2) known as Wilshire Manors — Thousand Oaks, which is located in Ventura County, California. Wilshire Diversified had obtained construction financing for this project from Glendale Federal Savings and Loan Association ("Glendale Federal") and had arranged for Glendale Federal to supply financing to purchasers of the units in the project. On July 19, 1976, I received from Robert Gilmore, a Deputy Commissioner of the DRE, who was employed

in the Los Angeles office, written notification that the deed of trust form which had been submitted in connection with Wilshire Diversified's application for a Final Subdivision Public Report on the aforementioned project was "not in compliance with Section 2924.6" of the California Civil Code and that a trust deed form "with proper wording" would have to be submitted.

4. True and complete copies of the DRE form received by Wilshire Diversified from Mr. Gilmore are attached hereto as Exhibits "A" and "B".

I have personal knowledge of the facts stated herein and if called as a witness to this action, could testify competently with respect to them.

DATED: September 28, 1977.

/s/ Mel Wynn
MEL WYNN

Subscribed and sworn to
before me this 28th day
of September, 1977.

/s/ Renee M. Barrett
Notary Public in and for
said County and State